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NON-TAX ADVANTAGES OF THE REVOCABLE TRUST (WITH EMPHASIS ON USE AS WILL SUBSTITUTE)

BY MILTON E. MEYER, JR.*
(in collaboration with Hayes R. Hindry)

There are no important tax advantages associated with the revocable trust.[1] However, it is important to stress that there are no tax disadvantages connected with this legal form of temporarily or (if death intercedes) permanently disposing of property. Stated another way, where the living trust is intended to be used in whole or in part as a will substitute, all the estate and income tax savings that can flow from one or more skillfully drawn testamentary trusts (including full use of the estate tax marital deduction) are equally available from a skillfully drawn revocable trust.[2]

This article will be devoted to a discussion of the non-tax advantages of the revocable trust—particularly those advantages that arise from the legal fact that the corpus of a properly drawn revocable trust escapes the rigors of probate upon the death of the grantor. It will be presumed that the reader has a basic familiarity with the legal concept of trusts and general principles of estate planning. The trusts we will deal with will have the common denominator of revocability—which includes, of course, the retained right in the grantor (or someone else) to alter or amend the terms of the trust and to add or withdraw assets from the trust corpus.

Authors of estate planning treatises typically give brief but favorable mention to the revocable trust (frequently referred to as the "revocable living trust"[3]) and allude to its ever increasing use. However, comment on the device is generally limited to a terse summary of commonly conceded advantages, with only passing reference to what, in this writer's opinion, is the greatest advantage offered—the economic advantage that can result from the legal avoidance of probate administration.

I. AN ENUMERATION OF ADVANTAGES

The advantages usually cited for the living trust include the following:

1. *Affords a Preview of Post-Death Administration.* By setting up the trust in his lifetime, the grantor is in a position to observe the facility with which his trustee accomplishes the objectives of the trust, making necessary changes in the trusteeship or the provisions of the trust as may be warranted.

2. *Affords a Useful Substitute for an Agency Relationship or a Potential Conservatorship.* If a person travels frequently or exten-

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*Mr. Meyer is a member of the Denver and Colorado Bar Associations and a member of the Denver firm of Hindry, Erickson and Meyer. His article is based on a 1960 address given to registrants of the course "Practical Problems in Estate Planning and Family Tax Planning" offered by the University of Denver College of Law.

1 Income of the revocable trust continues to be taxed to the grantor: Int. Rev. Code of 1954, § 676. Nothing is removed from the estate for federal estate tax purposes: Int. Rev. Code of 1954, § 2038. Similar results pertain under most state taxing laws. See, however, comment at note 27, *infra*.

2 Because of the revocability of the transfer into trust, no gift tax liability is incurred. *Burnet v. Guggenheim*, 288 U.S. 280 (1933).

3 To distinguish this form of trust from the testamentary trust which comes into existence after death, under the provisions of a will.

sively, or is called into military service, it may be necessary for him to entrust the handling of his investments or business affairs to another. An agency relationship suffers from its vulnerability to sudden legal termination by reason of the death or legal incapacity of the principal. The problem is especially acute when the principal is not heard from for protracted periods and might be dead (as during war time) or is the subject of a mysterious disappearance. At a time when the necessity for the functioning of an agent might be the greatest, the power of the agent to act might cease to exist or, at the very least, be uncertain. All these difficulties can be prevented by the intelligent use of a living trust in lieu of the agency technique.

A similar sophisticated use of the revocable trust is available to a person of advanced age or poor health who is realistic enough to recognize that the continued passage of time might result in a gradual impairment of faculties and judgment (whether or not sufficient eventually to justify legal adjudication of incompetency) that renders him unable to handle his own affairs with safety. The living trust offers a non-public and highly flexible solution to this potential problem and ought probably to be urged by members of the family where there is foreseeable danger that such a person may slip into that twilight zone where competency regresses but adjudication is either unwarranted or undesired. The properly drawn trust, of course, not only provides for the grantor during the balance of his life, but makes disposition of the trust property for the benefit of his family at his death. By keeping such a trust revocable, psychological hazards are frequently avoided. Furthermore, an irrevocable trust for the support of a grantor would lack the income and estate tax advantages normally associated with this legal form.[4]

3. *Affords (Within Limits) a Choice of Applicable State Law.* Although not free from doubt[5] it seems fairly clear that the grantor of a revocable living trust (particularly as to that portion of the corpus which is personalty) can specify that the law of a state other than his domicile shall govern all matters of administration and interpretation of the trust. It is clear, for example, that residents of New York State (where more restrictive rules as to trust accumulations and perpetuities have pertained in the past) have avoided these restrictions by setting up trusts in New Jersey or some other state of their choice, utilizing trustees domiciled in such other states, and specifying that the law of such other states shall govern. Whether one can avoid the property laws of his own jurisdication by taking lesser steps than suggested above is a highly technical question involving conflict of laws principles and is beyond the scope of this paper.

4. *Affords Less Vulnerability to Attack by Disgruntled Heirs.* Because a properly drawn and executed revocable trust will, as a

4 Where income of an irrevocable trust is reserved by the grantor, he not only remains taxable with respect to such income, but the corpus will be included in his estate: Int. Rev. Code of 1954, § 2036.

5 See Shattuck, An Estate Planner's Handbook, Chapter IX (1951).

matter of law, escape probate in virtually all jurisdictions, the opportunity for successful attack by disgruntled parties is substantially lessened. Probate procedure in most jurisdictions literally invites all comers to attack the validity of a will, and the highly technical requirements of testamentary disposition frequently provide the opportunity for successful attack. Quite the contrary is true with respect to circumstances surrounding the living trust. Requirements for execution are simple (normally the attested signature of the grantor is sufficient; formal acceptance by the trustee is seldom a prerequisite to a valid trust). If the trust has been in existence for a period of time prior to the grantor's death, there is a *fait accompli* aspect to the trust that discourages attack at his later death. Furthermore, the privacy of the trust (commented on later) and the absence of notice requirements can result in a situation where the dissident element may not even be advised of the grantor's death until long after its occurrence.

As will be emphasized at another place, the very advantages discussed under this heading put a grave responsibility on the draftsman of a living trust to discourage the use of the device where the grantor's intent is to prevent his wife, creditors or others normally protected by law from an effective assertion of their rightful claims.

5. *Affords Continuity of Investment Management and Flow of Income.* Every lawyer is familiar with the delays and problems that can attend the administration of a decedent's estate—assets must be located and marshalled, the interest or lack of interest of the decedent in a piece of property must be verified, heirs and beneficiaries must be located and served with various formal notices and given their opportunities to interpose objections. If the legal representative and his lawyer have no particular prior familiarity with the extent and nature of the property interests or the identity and whereabouts of interested parties, the problems become especially acute. Meanwhile, a widow and perhaps minor children have to be supported; a business, possibly, must somehow be run or, more likely, ground to an orderly halt. It is of necessity a time for conserving, liquidating, refraining from taking any investment action, however potentially rewarding. At best, it is a time of uncertainty and anxiety for the family of the deceased; at worst, it is downright chaotic, with real financial hardship (or, equally bad, the fear of it) affecting the family.

A properly drawn living trust can go a long way towards solving the above-described problems. In the first place, the grantor has had to take a good look at his assets (or at least some of them) at the time he placed them in the trust—widely scattered assets are likely to have been assembled; assets requiring some attention have probably received it. In any event, someone besides himself (namely, his trustee or trustees) has been inserted into the picture during his lifetime—an opportunity an executor or administrator rarely gets. Secondly, while the grantor may, if he chooses, continue as the dominant party in his trust arrangement for the balance of his life, controlling investment policy and asset management and deriving chief benefit from the trust income, the machinery has been set up to provide a continuity of asset management at his death and an immediate shift of income flow from himself to other members of his family. An active business that may constitute an asset of the trust has a better opportunity, perhaps, of continued existence for the benefit of the family than if subject to probate; investment opportunities normally not available to or availed of by an executor or administrator can be taken advantage of by the trustees if the trust provisions so permit; improper or deteriorating investments can be disposed of promptly without the necessary procedural delays attendant upon probate that may aggravate losses.

6. *Affords Greater Privacy.* For persons who crave privacy, the living trust performs another valuable function. Unlike the probate file, which is a public record containing a copy of the will, asset inventories, schedule of debts, and the like, the trust file is completely private. While disclosure of assets and liabilities must be made to taxing authorities by trustees as well as executors, appropriate laws normally prevent dissemination of this information. If there are probated assets in addition to trust assets, it is true that, under the law of most states, a copy of the inheritance tax return (listing all assets) may eventually have to be filed in the probate file. However, this is generally long after public curiosity occasioned by the death has diminished.

Sometimes probate file disclosures about a business interest which is part of a probate estate have given aid and comfort to competitors or resulted in a reduction in the value realized on liquidation. These hazards can generally be avoided where the interest is part of a living trust.

7. *Affords Substantial Immunity from Creditors and Other Claimants.* While morally a less defensible reason for considering use of the revocable living trust, it is true that, under the laws of most states, the grantor can preserve his assets from attack by creditors or others ordinarily having rights against his assets by placing them in such a trust. While normally attaching only after the grantor's death, there is reason to believe that limited immunity from creditors can apply in some jurisdictions even before the grantor's death.[6]

Of interest to Colorado lawyers is the fairly recent *Von Brecht* case in which the Colorado Supreme Court upheld the validity of a living trust against the claim of a surviving wife where the grantor established the trust with respect to substantially all his property six years before his marriage.[7]

8. *Affords Opportunity for Substantial Economic Savings.* In the judgment of the writer, this can be by far the most spectacular of all the advantages of using the revocable living trust. The balance of this paper will be devoted to demonstrating how this can be so and in making practical suggestions concerning the achievement of these savings. Since the magnitude of these savings is in direct relationship to the amount of property successfully placed

6 *Id.* at 74, 91-94, 97.

7 Denver Nat'l Bank v. Von Brecht, 137 Colo. 88, 322 P.2d 667 (1958). The court commented with apparent favor on the earlier Colorado case of Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953) as follows: "The trust in that case was upheld as against a plaintiff *who was the wife of the settlor at the time it was created*. Here the trust was set up and in full operation for six years before the settlor married the lady who now seeks to invalidate the agreement." (Emphasis supplied) The foregoing is quoted verbatim because of factual differences between the transactions in the *Thuet* and *Von Brecht* cases.

in a trust of this kind, this paper will emphasize the desirability of placing most of one's property in the trust—all, if possible. This is one place where, if a little bit is good, a lot is even better.

II. USE OF TRUST AS A WILL SUBSTITUTE

Undoubtedly there are still lawyers who shudder at any open reference to the use of the revocable living trust as a will substitute. However, since the *Von Brecht* case, previously alluded to, there would appear to be no valid reason in Colorado to fear that an expressed intention to utilize a revocable living trust in place of a will to accomplish an ultimate disposition of property will cause the effort to be struck down as an attempted testamentary disposition that fails to satisfy the technical requirements of a will. The Colorado Supreme Court said in that case:

> Where, as here, the property involved in a trust is assigned, transferred and set over to the trustee and remains in the name of the trustee, the interest of the settlor therein passes to the trustee in presenti and while the settlor remains alive the transfer is inter vivos and not testamentary. Hence, if an owner of property can dispose of it inter vivos and thereby render a will unnecessary for accomplishment of his practical purposes, he has a right to do so. *The motive in making such a transfer may be to obtain the practical advantages of a will without the necessity of making one, but the motive is immaterial.* (emphasis supplied)[8]

With this judicial "green light" smoothing over any legal obstacles to the use of the living trust in Colorado, what is the measure of the potential economic savings? Are we talking about enough in dollars to warrant the use of a non-familiar pattern of doing things? Where do the savings actually arise? Are there not other substantial costs incurred in the use of the living trust so that the hoped for savings are less than claimed? Does not the grantor lose substantial control over his property? These are some of the questions we will now endeavor to answer.

An example will be helpful. If a Denver resident dies, leaving a probate estate of $250,000, his estate will incur an executor's fee of $9,000[9] (if the executor claims the full statutory fee allowable) and attorney's fees of $10,300[10] (if the lawyer claims no more than

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8 *Id.* at 99, 322 P.2d at 672.

9 Colo. Rev. Stat. § 152-14-16 (Supp. 1957).

10 The Minimum Fee Schedule adopted by The Denver Bar Association on March 12, 1958 reads in part as follows:

"*Estates*

A. Minimum Charge—regardless of inventory	$150.00
B. Percentages based on gross value of property and assets inventoried in County Court (these percentages do not include services rendered in connection with insurance, joint tenancies, and other property or assets not included in inventory)	6% of gross to $5,000 5% of next $20,000 4% of next $225,000 3% of next $250,000 No recommendation for balance of fee on estates exceeding $500,000
C. Percentage based on all property and assets not inventoried in the County Court, which require the preparation of legal instruments, state or federal inheritance tax returns (including particularly all assets and property in joint tenancy, and all life insurance in excess of $50,000.00)	1% of the total gross value thereof."

the "minimum" fee prescribed by the Denver Bar Association).[11] By tradition and custom (and probably by law) in Colorado, as well as in virtually all other jurisdictions, an attorney is always employed to represent the executor or administrator during probate where the fiduciary is a non-lawyer or trust company. Normally this is the attorney who prepared the will, if a will is probated, and this practice is rather uniformly adhered to around the country. There will also be various other administrative costs incurred. Tables have been prepared which estimate total administrative costs for various sizes of estates on a national average basis.[12] These expenses, of course, are in addition to federal estate tax and state inheritance taxes, which apply in any case where the estate is large enough, whether or not a will is used.

Illustrating the savings is the actual case of an elderly Denver resident who, resisting persuasive efforts favoring the living trust, insisted that the writer prepare for him a will containing a testamentary trust for his family. Such a will was executed by him early in December of 1958. A week later he decided he wanted the living trust instead. One was prepared for him which achieved the same family objectives and tax savings as his will had. This was executed on December 31, 1958. He died ten months later leaving a taxable estate of over $400,000, slightly less than one-half of which was in joint tenancy with his wife with the remainder being in his living trust. Not one item of property had to be probated. Although the jointly held property would not, of course, have been probated in any event, the consequent savings to his family resulting from his decision to utilize the living trust still amounted to almost $17,000 net.[13]

11 It will be of interest to Colorado lawyers that the attorney's fee for handling a $250,000 probate estate in Denver is $2,550 more than for the same estate in Chicago and $2,875 more than the same estate in Milwaukee (see report of Survey of Bar Association Schedules prepared by a special Committee of American Bar Association appearing in 98 Trusts and Estates, 1012-14 (1959).

It is of further interest to compare the figure of $10,300 (the attorney's fee for a probate estate of $250,000 in Denver) with the fees for the same size estate in 15 other states having statutory or statewide Bar Association fee schedules, as summarized in 99 Trusts and Estates 719-21 (1960). The average of such fees in these 15 states is approximately $7,350.

12 The following are excerpts from "Tax Planning Tables" published by Institute for Business Planning, Inc.:

Gross Estate Less Debts	*Probate and Administration Expenses*
$100,000	$ 8,200
200,000	15,400
300,000	22,200
400,000	28,700
500,000	35,000
1,000,000	64,000

13 In Denver the jointly held property attracts an attorney's fee of 1% under the minimum fee schedule.

In a similar case familiar to the writer, where the grantor died just five months after replacing his will with a living trust which contained his entire estate of some $450,000, the savings to his family exceeded $25,000 net.

If all this is true, why is the living trust not more frequently used? Why is it that many persons of property are not even aware of the living trust as a total or partial alternative to the use of a will?

A well-known authority on estate planning stated in one of his better known works:

> The [revocable living trust] device would be used even more, in the author's opinion, if it were not for overzealous preoccupation among businessmen (and to a dangerously large degree among lawyers) with prospective tax savings.[14]

While the above observation of the distinguished writer is possibly correct, it is this writer's view that only the New England restraint of the quoted authority prevented him from citing additional reasons in explaining why the device is not more frequently used. For example, it is the present writer's belief that more important reasons for the infrequency with which the living trust is used as a total or partial will substitute would have to include the following:

(1) Unfamiliarity with the potentialities of the living trust on the part of many attorneys and financial advisors.

(2) An unwillingness on the part of some clients, even after adequate explanation, to depart from patterns they consider familiar.

(3) An "overzealous preoccupation" (to borrow from the passage quoted above) among some lawyers and some representatives of corporate fiduciaries with the perpetuation of the application to decedents' estates of tradition-hallowed, time-honored, but overly-protective and elaborate judicial machinery, which application has the incidental effect of providing very handsome legal and executor's fees for the same lawyers and corporate fiduciaries for work that frequently is quite routine, if time consuming, in nature.

The point last made will be vehemently denied by many attorneys and trust officers. A number of "legal" arguments will be brought to bear for the purpose of demonstrating the dignity of and necessity for the formal administration of decedents' estates. There will, perhaps, even be vague references to "illegality," "sham," "fraud" and the like directed at efforts to by-pass probate through use of the living trust.

Nevertheless, the late Professor Thomas E. Atkinson, in his well-known and scholarly work on the law of wills,[15] states ". . . in more than half of the cases in which people leave some property, it has been found possible to avoid administration."[16] After citing the expense, delays and inconvenience of administration as being the

14 Shattuck, *supra* note 4, at 76.
15 Atkinson, Wills (2d ed. 1953).
16 *Id.* at 566.

causes for attempts to dispense with probate, he continues "The popular demand for reform in the latter field [probate court procedure] is largely inarticulate, but is nonetheless real as shown by the efforts to shun the probate courts. Yet one who seeks to find a solution to the problems of dispensing with or shortening the administration of decedents' estates is literally a voice crying in the wilderness."[17] Possibly the third point stated above suggests a reason why this is so.

Probate procedure has its origin in the English ecclesiastical courts of several centuries ago. As modified in both England and America, it has served a vital need in protecting the property of a deceased for his beneficiaries and creditors and against marauders and unscrupulous debtors. This was accomplished essentially through the extraordinary police and coercive powers of the judicial tribunal, however ponderous and complex.

In the last several decades, however, the economic and sociological development of this country has produced a number of refinements in the techniques of property ownership, property transfer and debtor-creditor relationships that have made unnecessary in most cases resort to the courts for the enforcement of rights. For example, recording statutes, rules and regulations of stock transfer agents, the regulations surrounding ownership of United States Savings Bonds and other registered evidences of indebtedness, rules relating to the protection of depositors in commercial and savings banks, the extent to which commerce is carried on through checks, drafts, notes and other highly regulated secured and unsecured credit transactions without recourse to cash and other bearer forms of wealth, the popularity of safety deposit boxes with their technical rules regarding access, and the extensive use and development of the various forms of life insurance contracts. All these have minimized the danger of unauthorized persons making off with the deceased's assets, leaving family and creditors high and dry. A large part of the function of the probate court has therefore been filled by other, less cumbersome, means without, however, depriving aggrieved parties of recourse to the courts. The chief remaining functions—the satisfaction of creditors of the deceased (including taxing authorities) and the orderly passage of title to the designated beneficiaries of the deceased can certainly be accomplished without the necessity of formal administration.

One is certainly free to question the need for the more costly, complex and dilatory processes of probate administration, if a revocable living trust can accomplish, as to all or some part of a person's estate, the following things:

1. Complete freedom to alter the distributive pattern right up to the moment of death or incapacity.

2. Instantaneous transfer of assets from decedent's control to that of his chosen beneficiaries (or to trusts for their benefit and protection).

3. Titles as indefeasibly vested as if they had been processed through probate.

4. Immediate availability of income for decedent's beneficiaries.

17 *Id.* at 575.

5. All the estate tax and inheritance tax minimization that can be accomplished through a well-drawn will.

6. Full protection for decedent's creditors and the various tax collectors.

7. Preservation of the rights of aggrieved heirs and others interested in the estate to test their claims against the estate in court.

8. Elimination of or substantial reduction in administration expenses that range from 5% to 10% of the value of the estate.

9. The securing of all the other advantages listed at the outset of this article.

10. The accomplishment of all the foregoing without interference with decedent's enjoyment of his property prior to his death.

The writer's experience is that the properly drawn revocable living trust can and does accomplish the above-stated objectives in a most satisfactory manner.

The remainder of this article will be devoted to a discussion of a few of the techniques and practices that can be employed by the draftsman of a revocable living trust to insure the accomplishment of these objectives. It will also deal with the questions, raised earlier, of whether the cost of using the living trust form substantially reduces the hoped for savings and whether the grantor must divest himself of all real control over his assets.

III. Techniques in Drafting and Administration

A. The Matter of Costs.

Even though a client believes (or takes on faith) that the revocable living trust will accomplish the various objectives detailed in Part II (most of which cannot be achieved until at or after his death), he is not generally interested in going further unless he can also be persuaded that he can live with (1) the cost in dollars of (a) getting the program into operation (expenses of drafting and related legal services, transfer fees, etc.) and (b) continuing the program during the balance of his life; and (2) the cost in reduced control over his assets resulting from the immediate legal effectiveness of the trust. Future benefits are fine, but they are never as real as the current detriments incurred in achieving them.

The question of the legal fee for drafting and related services must, in the judgment of the writer, be forthrightly dealt with. The investigative and fact-finding activity of the attorney must be extensive because he must take specific action with respect to each of the client's assets. However, the determination of family objectives and the applications to them of tax minimizing procedures is no more and no less than that involved in traditional forms of estate analysis and planning; the drafting burden is not substantially greater than when the will with testamentary trust is the keystone of the estate plan, rather than the revocable living trust.

The essential difference comes from the fact that the draftsman who utilizes the revocable living trust instead of the will must charge and be paid a realistic fee for his current services; he has no near-vested interest in the client's estate at the client's death comparable to that enjoyed by the draftsman of a will which permits the latter to charge a completely non-realistic fee (or no fee at all) for his estate planning services, secure in the knowledge that he or his firm will almost certainly be employed to represent the executor during the probate of the estate.[18] The magnitude of the economic reward for this service has been previously commented on.

The fee, then, charged his client by the draftsman of the living trust should be substantial enough that, consistent with the criteria set forth in the canons of ethics,[19] he is amply compensated for his services on a current basis completely without reference to any post-death bonus. This cost is one the client must be persuaded to incur, notwithstanding the advantages purchased by him will not be substantially realized until after his death. This means, of course, that the amount of the charge must, nevertheless, be modest when set alongside expected savings. The grantor must also be informed that there will likely be some additional legal costs after his death relating primarily to the necessity for filing inheritance tax and estate tax returns. However, it can be pointed out that such services should be compensated on the strength of their own merits, the same as any other specific legal services. It will also be noted that custom and practice does not require that the draftsman perform these services.

The other elements of "cost" described above—current cost of operating the trust, and the cost measured in loss of control—are best dealt with, in the view of the writer, by the combined factors of (1) the selection of trustees and (2) non-disclosure of the trust during the grantor's life.

1. *Selection of the Trustees.* The writer wishes to make clear that he is no enemy of the trust companies. He is a firm believer in the worth of their contributions to the solution of problems of property ownership and management and recommends their use in almost every instance where the term of a trust survives the death of the grantor, and in some instances where this is not so. However, to avoid needless trust management expenses and an unacceptable loss of control and freedom of management with regard to his estate during the grantor's lifetime, the writer suggests in most cases that the grantor and two other individuals serve as trustees

18 Not only would the normal attorney-client relationship be expected to produce this result, all things being equal, but in most communities it is the announced practice of the corporate fiduciaries, when named executor in wills, to employ the respective draftsmen to represent them during probate of the particular estates. This is an area where restraint on the part of the attorney in initial charges and the requisite amount of patience are twin virtues likely to be handsomely rewarded at a later date.

19 "In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; . . . (4) the amount involved in the controversy and the benefits resulting to the client from the services . . ." Canons of Professional Ethics, § 12.

until the grantor's death or legal incapacity, at which time a pre-designated trust company takes over as successor, generally sole, trustee.

There is, of course, no legal barrier to the grantor's serving as his own trustee.[20] The insertion of additional individual trustees in the picture is for the simple purpose of facilitating the transfer of the title to the trust res to the successor trustee upon the death or legal incapacity of the grantor. Without the probable factor of survivorship of one or both of the two co-trustees, the mechanics of transfer of legal title with respect to the trust res to the successor trustee at death or adjudicated incapacity of the grantor-trustee would require the intervention of a court (although the trust would certainly not fail). It is, of course, the avoidance of any court intervention (whether probate or otherwise) which is sought to be achieved by use of the revocable living trust.

The duties and responsibilities of the individual trustees other than the grantor are real but not generally substantial. All income from the trust res is reserved by the grantor to himself during his life. It can be received by him in his capacity as a trustee and used

20 The grantor can be sole beneficiary if he is one of two or more trustees, or he can be sole trustee if he is one of two or more beneficiaries. 2 Scott, Trusts § 114 (2d ed. 1956). Both conditions apply under the technique suggested herein.

In Colorado, the case of Dunham v. Armitage, 97 Colo. 216, 48 P.2d 797 (1935), thought by some to require a contrary conclusion, is easily distinguishable. There the grantor, purporting to establish a trust with another as trustee, retained possession in herself for life in a non-fiduciary capacity, along with the "rents, issues and profits" and the power of revocation. The court properly held this to be an attempted testamentary disposition. This distinction is recognized in the Von Brecht case (see note 6, *supra)* where transfer of title and possession to the *trustee* was actually accomplished.

by him as a beneficiary. His retained power to amend, alter or revoke the trust gives him effective (and legal[21]) control over the corpus. The other trustees share with him (as joint tenants with right or survivorship[22]) the legal title to the trust assets. In the event of the grantor-trustee's absence (explained or unexplained) or his physical or mental incapacity (short of legal adjudication) the other trustees, under a well-written instrument, will, acting without the grantor-trustee, have authority to expend trust income and corpus for the benefit of the grantor and his dependents. Their prime duty, of course, comes after the grantor's death or adjudicated incapacity in transferring title to trust assets to their successor trustee.

Although complete and detailed record-keeping by the trustees of the affairs of the trust is to be encouraged (and good business practice would dictate that this be done), a certain informality in this regard should not be fatal to the bona fides of the trust. The federal tax law, of course, treats the revocable living trust as a nullity for tax purposes; the grantor continues to report all income from the trust in his personal return and is given the benefit of all deductions of the trust, just as though the trust did not exist.[23] It further appears that there is no requirement that the trustees of a revocable living trust file a Form 1041 (fiduciary income tax return) with respect to the trust income.[24] Most state laws follow this rule (or apply no penalty for non-compliance with return requirements). In the administration of the typical trust of this type during the grantor's lifetime, distinctions between income and principal (except for income tax purposes) are generally ignored.

The very existence of a revocable trust frequently breaks down what might otherwise be a psychological resistance on the part of an individual to keeping his financial house in order (thereby avoiding the problem of marshalling the assets that confronts many executors upon the death of their testators). An accurately maintained inventory of trust assets is a minimum requisite.

Viewed against the foregoing, it is apparent that adult members of the grantor's family, or close friends or business associates, might well serve as co-trustees with him. Normally they would be expected to serve without compensation. Closeness of relationship brings no adverse tax results, of course, because of the absence of estate tax or income tax advantages in the use of the revocable trust.

Selection of the successor corporate trustee brings into play all the criteria normally employed in the selection of a corporate fiduciary.

2. *Non-disclosure of the Trust.* It is the writer's recommendation that the existence of the trust be not disclosed (so far as the

21 The court in *Denver Nat'l Bank v. Von Brecht*, 137 Colo. 88, 97, 322 P.2d 667, 671 (1958), quotes with favor from *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1949): "A reservation by a Settlor of the power to control investments [resulting from the reservation of a power to alter, amend or revoke the trust] does not impair the validity of the trust."

22 2 Scott, Trusts § 194 (2d ed. 1956).

23 Int. Rev. Code of 1954, §§ 671, 676.

24 Rev. Rul. 57-51, 1957 Int. Rev. Bull. No. 6, at 14.

general public is concerned) during the grantor's lifetime. This stems not from any apprehension that the revocable trust is not a respectable legal vehicle or that knowledge of its existence would invite attack. It arises, rather, from a recognition that the freedom of trustees to deal with the assets of a trust is substantially inhibited if transfer agents, title examiners, and potential buyers and sellers are put on notice of the existence of a trust. Over the years the law has placed great burdens on persons dealing with trustees and trust assets to inquire into the authority of the trustees to act.[25] The fear of such persons that they may suffer economic loss by failure to so ascertain this authority frequently restricts the ability of trustees to buy or sell trust assets on a favorable basis.

The usual way for a trustee to conceal the existence of a trust is to carry the title to trust assets in the name of a nominee. Most all corporate fiduciaries have one or more such nominees (individuals, partnerships or corporations) for this purpose (certain administrative economies can also be achieved by professional trustees in the use of the nominee). Consequently, a revocable living trust should contain provisions permitting nominee registration of trust assets.

A variety of nominee techniques are available to the individual co-trustees during the grantor's life. The most useful (and most obvious) one is the placing of legal title in the joint names of the trustees with rights of survivorship and not as tenants in common, without indicating their fiduciary capacities. This should be supported by a private agreement signed by all the trustees and kept in the possession of the grantor in which they acknowledge that whenever they hold title to property in the manner described above, they are doing so as trustees of a particularly described trust, and not for their individual benefits. In effect, the trustees are serving in their individual capacities as nominees for themselves as trustees. The survivorship feature insures the probability of someone being available with the legal capacity and the equitable duty of making the final transfer to the permanent successor trustee (or, in a proper case, outright to persons designated in the trust instrument) upon the demise or legal incapacity of the grantor.

This technique lends itself particularly to securities,[26] real estate, and savings accounts. In many areas, (including Denver) checking accounts can likewise be maintained in the names of three joint tenants. In a few instances, the trustees may have to use the names of only two of their number as nominees, but this should afford no problem. Dividend and interest checks made out in the three names can be deposited in a checking account established in the joint names of the nominees without necessity of personal endorsement. Funds can then be checked out for the benefit of the income beneficiary.

Where securities are concerned, a simplification of the foregoing can be achieved through use of a joint brokerage account in the individual names of the trustees. "Street name" registration of securities by the broker removes some of the cumbersomeness of the

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25 Restatement (Second), Trusts §§ 288, 291, 297, 326 (1959).

26 Watch, however, inclusion of stock of so-called "Sub-chapter S" or "tax-option" corporations. Ownership by a trust will disqualify the corporation from the tax benefits of Sub-chapter S. Int. Rev. Code of 1954, § 1371(a)(2).

three-name registration and makes easy the handling of income. Furthermore, transfer of trust assets is facilitated as the signatures of all trustees (or the prior execution of assignments separate from certificates by one or more of them) is rendered unnecessary. This multiple signature requirement normally would be a problem only when one of the trustees lives some distance away, is temporarily absent, or is physically incapacitated.

It is frequently possible to handle tangible personal assets in the three-name manner as well. A properly executed bill of sale and the "back-up" nominee agreement should provide sufficient authority for the trustees to deal with such assets, notwithstanding that actual possession is retained by the grantor as one of the trustees.[27] An alternative available where grantor and his spouse are both alive is the execution of a joint agreement where each recognizes that certain tangible personalty (described generally or specifically) is owned by them as joint tenants with rights of survivorship. Such an agreement should have the salutory effect of avoiding probate as to such assets while making it unnecessary to transfer such assets into trust.

Nominee alternatives to the three-name joint tenancy practice are afforded by the use of "dummy" corporations and partnerships. In either case, a contract between the corporation or the partnership and the grantor (or the trustees) is executed which affirms that the legal entity, for a valuable consideration, is holding title to particular assets solely as agent or nominee and subject to the order of the grantor (or the trustees). Where the grantor is a party to the agency contract, his rights therein should be made expressly assignable, in order to permit transfer to his trustees. Where a grantor owns oil interests in a number of states, for example, the proper use of the corporation for title holding purposes in avoiding a number of costly ancillary administrations is apparent (although such a corporation should be qualified to do business in the several states). Inheritance tax obligations at the grantor's death must still be examined by the trustees.[28]

In a proper case an existing active corporation (rather than a "dummy" created for the purpose) can be used for this nominee purpose. Where a "dummy" is used, care must be exercised to prevent its being treated as a taxable entity. Proper maintenance of corporate minutes, avoidance of bank accounts in the corporate name, and the filing of corporate income tax returns showing "no assets, no liabilities, no income, no expenses" should assist towards this end. Dividend checks received in the corporate name should probably be endorsed to the trustees or directly to the income beneficiary without deposit in a corporate account, although, properly substantiated, even this should afford no problem. A partnership used for this purpose would hold title to assets in its entity name.

27 That this arrangement is not entirely unrealistic is supported by the fact tax conscious individuals sometimes make gifts of valuable tangibles such as art works, libraries, yachts, and the like to charities, reserving possession for life. Whether this is technically a reserved legal life estate or a reserved life interest in a trust, the technique appears entirely valid and is recognized for tax purposes (the grantor gets a current income tax deduction for the actuarial value of the remainder interest in the object and the entire value is removed from his estate for estate tax purposes. Rev. Rul. 57-293, 1957-2 Cum. Bull. 153).

28 Although no special tax advantages have been claimed herein for the revocable living trust, it appears that in some jurisdictions there is no inheritance tax at grantor's death with respect to assets of such a trust. For example, Nebraska and Wyoming appear to be such jurisdictions.

Careful records should be maintained on behalf of the partnership, also.

As in the case of the use of the individual joint tenancy, the purpose of the corporation or partnership is to assure that, even though the trust is undisclosed, there is a facility for the transfer of legal title to trust assets available to the surviving trustees after the death or legal incapacity of the grantor, thereby making recourse to a court decree unnecessary in the chain of title. Other acceptable forms of nominee arrangement can probably be devised by imaginative draftsmen.

The handling of unincorporated business interests as trust assets is a little more difficult. An unrecorded bill of sale or assignment of tangible and intangible assets and accounts receivable to the individual trustees (in their fiduciary capacities or as nominees) probably takes care of a proprietorship. The fact that such an undisclosed assignment may or may not be enforceable as against creditors is not particularly relevant as the writer is presuming a willingness on the part of the grantor to have his just debts paid both during his lifetime and after his death. Consequently, the properly drawn trust instrument will impose upon the trustees the obligation to pay the grantor's debts at death to the extent his probate estate, if any, is unable to pay them. We are entitled to presume that the grantor, as income beneficiary during his lifetime, will discharge his business debts as they arise.

A partnership interest is a bit more difficult. While, under the entity theory of partnerships adopted under the Uniform Partnership Laws, the assignment of a partnership interest carries with it all the assets and rights making up such interest,[29] an assignment not permitted by the partnership agreement or consented to by the partners is of limited efficacy.[30] The writer and his associates have, therefore, found it useful, where possible, to insert a provision in partnership agreements consenting to a partner's transfer of his partnership interest to trustees of a revocable trust so long as the partner is one of the trustees and the principal beneficiary. Again, whether or not such an assignment is effective to frustrate rights of creditors of the partner-grantor or of the partnership is not relevant, for reasons mentioned above. The limited objective, of course, is to vest the individual trustees with the legal right to transfer title to

29 Colo. Rev. Stat. §§ 104-1-25, 27 (1953).
30 Colo. Rev. Stat. § 104-1-27 (1953).

the assets making up the partnership interest to the successor trustee upon death of the grantor, or, in the alternative, to carry out the provisions of any buy-sell agreement that the grantor-partner or his trustees may have been party to.

Although not essential to the avoidance of probate objective, it would seem sound estate planning in many cases to have the death proceeds of life insurance and similar contracts made payable to the trustees of the revocable trust.[31] This can be accomplished by a mere change in beneficiary designation.

Summarizing this section on the costs of using the revocable living trust, it will be apparent that, other than the original costs of draftsmanship and supervision by an attorney, the actual costs, both in dollars and in loss of control, will be entirely minimal during the lifetime of the grantor. The economic objective of avoiding the costs of probate, therefore, will not be seriously frustrated.[32]

B. The Continuing Need for a Will

Notwithstanding the use of the revocable living trust as a will substitute, the draftsman is well-advised to prepare at the same time (for execution after the trust has been executed[33]) a simple will of the "pour-over" variety. The effect of the will is to transfer to the trust in a testamentary distribution any assets deliberately or inadvertently not included in the living trust, thereby funneling all assets through the trust in the interest of comprehensive estate planning. Where the preparatory work has been thoroughly done by the draftsman and the grantor has conscientiously followed instructions in his subsequent activities, there will be no need to do more than simply lodge this will with the probate court upon the grantor's death.

Regardless of liberalizing laws in some states,[34] the writer and his associates deem it desirable to physically bind into the will a conformed copy of the living trust for identification purposes. Language is also inserted in the will to the effect that, if the trust should have been revoked or for any reason be void or become invalid, the executor must nevertheless distribute the assets of the estate to a named trustee (normally the trust company named as successor trustee in the trust) to be used, handled and distributed according to the terms of a testamentary trust whose provisions are identical with those set forth in the revoked or void living trust. By having a copy of the trust bound into the will, there can be no question as to what these terms are.

Of course, if the grantor truly wanted to revoke his living trust because the terms were no longer satisfactory to him, he would take the additional precaution of changing his will (or of revising the trust and the "pour-over" will). The foregoing technique is

31 Colorado lawyers will be mindful that where, as here, the trust is charged with the payment of creditors, there will be a probable loss of the Colorado inheritance tax exemption on life insurance.

32 Figures as to savings used in actual examples appearing earlier in the text are net after drafting fees and post-death legal services.

33 See discussions of pour-over problems in Shattuck op. *cit.*, *supra* note 4, § 14; Polasky, "Pour-Over Wills," 98 *Trusts and Estates* 949 *et. seq.* (1959). See in particular Colo. Sess. Laws 1959, Ch. 286.

34 Colo. Sess. Laws 1959, Ch. 286; Polasky, *supra* note 33.

really intended to frustrate attack by a disgruntled party contending revocation or invalidity of the living trust. Even if he is successful in such action, he will be faced with an identical testamentary distribution of the estate, the only difference being that the value of the estate is now diminished by the probate and administrative costs that would otherwise be avoided.[35]

For the above reasons, and whether or not the applicable law so requires, the writer continues to recommend, whenever changes are made in the terms of the living trust, that the will thereafter be republished or rewritten, with the revised trust provisions physically bound therein.

C. Miscellaneous Drafting Suggestions.

In addition to the normal instructions, limitations, powers and duties pertinent to good trust draftsmanship, the writer urges that consideration be given to the following items in drafting a revocable living trust designed as a will substitute:

1. *Payment of Grantor's Debts and Taxes.* Responsible draftsmen will impose upon the trustees the affirmative duty to pay the just debts and taxes of the grantor to the extent the probate estate, if any, cannot do so. While taxing authorities have laws sufficient to protect themselves, it may be that other bona fide creditors would find their rights to be paid cut off or diminished in some jurisdictions. This has been previously commented on.

2. *Elections with Respect to Filing Estate, Income, and Gift Tax Returns.* Because of probable elimination of a probate estate, the duty to file estate and inheritance tax returns may necessarily fall on the trustees of the living trust.[36] This could also be true with respect to final income tax[37] and gift tax[38] returns of the deceased grantor. The trustees, therefore, should be expressly armed with the authority to make the various elections with respect to such returns. These include, for example, whether to deduct certain administrative expenses from the estate tax return or the income tax return—which election can affect the size of the marital deduction share, if any, and the rights of income beneficiaries and remaindermen under some circumstances; whether to file a joint income tax return with the deceased grantor's spouse—and assume liability for possible tax deficiencies of such spouse; and whether to file a joint gift tax return with the deceased grantor's spouse.

3. *Exoneration of Successor Trustees from Liability with Respect to the Administration of Prior Trustees.* An argument sometimes heard as a reason *not* to use a revocable living trust in the manner outlined in this paper is that the successor corporate trustee, because of its liability for the acts and doing of its predecessors, would have to charge an acceptance fee so substantial (to cover the expense of an audit of prior accounts) that the hoped for savings in avoiding probate administration would fail to be realized. This is nonsense. The successor trustee should be expressly exonerated

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35 For this reason the writer and his associates had no hesitancy in recommending the use of the revocable living trust as a will substitute even during that period of time, prior to the 1958 Colorado Supreme Court reversal of the lower court holding in the Von Brecht case (note 6, *supra*), when the validity of this form of property disposition in Colorado was thought by some to be in doubt.

36 Int. Rev. Code of 1954, § 2203.

37 Int. Rev. Code of 1954, § 6012(b)(1).

38 Treas. Regs. 25.6019-1(b) (1958).

from the duty of inquiring into the prior administration and specifically permitted to conclude that the assets turned over to it by the prior trustees constitutes the entire trust estate.

4. *Nominee Powers.* As discussed at length earlier, a power permitting the trustees to hold title to trust assets in the name or names of one or more nominees is essential to the smooth operation of the trust during the grantor's lifetime.

5. *Power to Revoke.* Last but not least is the power to revoke, alter or amend retained by the grantor. This permits the trust instrument to be as ambulatory as a will and thereby qualify in all respects as a will substitute.

In conclusion, the writer believes that the current cost of probate administration is nothing more nor less than another "death tax" levied on the assets of a decedent's estate; that this particular expenditure produces nothing of benefit for the family of the deceased; that this drain on an estate is tolerated by the general public only because it has been led to believe that such costs are "normal" and unavoidable. The writer urges that the legal profession give greater consideration to the use of the revocable living trust as a means of reducing the high cost of dying.

A LAW FIRM PENSION PLAN?

By LESTER R. RUSOFF*

Two areas of tax law meet here. One relates to pension plans and the other relates to the treatment of unincorporated organizations as corporations for tax purposes.

Substantial tax advantages can be obtained if an employer establishes a pension plan, meeting certain requirements, for the benefit of his employees. An employer may deduct his contributions to the plan.[1] Income earned by principal accummulated under the plan is exempt from income taxation.[2] Contributions made by the employer are not taxed to the employees when the contributions are made but only when benefits are distributed or made available to them,[3] and if the interest of an employee is distributed within one taxable year on account of his death or separation from the employer's service, his gain is taxed only as long-term capital gain.[4] Because of these tax advantages, a qualified pension plan is especially beneficial to persons in high tax brackets. Their contributions to such a plan may give them much greater after-tax benefits than they would receive from comparable increases in salary.

The Internal Revenue Code extends these privileges, however, only to a plan "of an employer for the exclusive benefit of his employees or their beneficiaries."[5] Thus a plan does not qualify if the employer is included as a participant.[6] This does not create difficulties in the case of a corporate employer, because shareholder-employees may participate in a plan without necessarily preventing it from qualifying.[7] However, it prevents an individual proprietor or a member of a partnership from participating in a qualified plan.

This situation has led to efforts in two directions. First, legislation has been proposed to allow the self-employed to deduct sums which they set aside for their own retirement. H. R. 10, to this effect, is now under consideration. Second, some unincorporated groups have sought to use the concept of an "association" to gain the income tax treatment of a corporation and thus to establish qualified pension plans.

The Commissioner has long used the concept of an "association" to extract additional taxes. This concept appears in the definition of a corporation, which is stated to include associations, joint-stock companies, and insurance companies.[8] Thus, the Commissioner has been able to impose the corporate income tax on the group and then to tax its members on amounts distributed to them, as dividends. This approach has not been much of a threat to partnerships of doctors or lawyers, probably because such partnerships have rarely desired to imitate the basic characteristics of a corporation and because such partnerships, if treated as associations, could usually de-

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1 Int. Rev. Code of 1954, § 404.
2 Int. Rev. Code of 1954, § 501(a).
3 Int. Rev. Code of 1954, § 402(a).
4 Int. Rev. Code of 1954, § 402(a)(2).
5 Int. Rev. Code of 1954, § 401(a).
6 I.T. 3268, 1939-1 Cum. Bull. (Part 1) 196.
7 Treas. Reg. § 1.401-1(b)(3) (1956), as amended, T. D. 6301, 1958-2 Cum. Bull. 197.
8 Int. Rev. Code of 1954, § 7701(a)(3).

duct substantially all of the earnings of the group as salaries paid to members, so that no substantial corporate tax would be incurred.

Because of present interest of doctors and lawyers in setting up qualified pension plans, however, we must inquire into the law which developed when the concept of an association was used primarily to collect more taxes from unincorporated groups. The leading case was *Morrissey v. Commissioner*.[9] In that case, real estate was transferred to trustees. They were authorized to choose their successors, to buy, sell, and operate land, to construct and operate golf courses and club houses, to receive the income, to make investments, and generally to manage the property as if they were the owners. The trustees had no power to create liability personal to the beneficiaries. The beneficiaries were to get transferable certificates of interest. Neither the death of a trustee nor that of a beneficiary was to terminate the trust. The Supreme Court held that the group was an association and could be taxed as a corporation. It said, "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity."[10] The Court indicated that the result was influenced by: the existence of associates in an enterprise for doing business and provisions making for continuity of existence, centralization of management, transferability of beneficial interests, and limited liability.

Which factors were most significant? It has been thought that they were centralization of management and continuity of life.[11] This seems to have been the position of the Treasury Department under the 1939 Code.[12]

The next question is this: does local law govern in deciding whether the essential characteristic of an association exists? The regulations under the 1939 Internal Revenue Code gave the impression that it did not. They included this statement:

> For the purpose of taxation the Internal Revenue Code makes its own classification and prescribes its own standards of classification. Local law is of no importance in this connection. Thus, . . . [t]he term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also . . . certain kinds of partnerships.[13]

The Supreme Court used language pointing the same way:

> Neither the conception of unincorporated associations prevailing under the local law, nor the relation under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed.[14]

The regulations might have been interpreted to mean only that federal law determined the standards of classification of an association and that local law determined whether those standards are met in a given case; but the language of the Supreme Court seems to give local law no effect.

Only one case, apparently, held that a group of professional men

9 296 U.S. 344 (1935).
10 *Id.* at 357.
11 Driscoll, *The Limited Partnership and the Association Question*, 1960 So. Calif. Tax Inst. 539, 553.
12 Treas. Reg. 118, § 39.3797-2, 39.3797-4(a) (1953).
13 Treas. Reg. 118, § 39.3797-1 (1953).
14 Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110, 114 (1925).

was taxable as an association, before such classification became a benefit rather than a burden. That case was *Pelton v. Commissioner.*[15] There, several doctors transferred their equipment to themselves as trustees, with authority to operate a clinic or any allied business. They agreed that the trustees should not be personally liable for acts done in performing their duties. This attempt to limit liability apparently did not apply to the individual doctors as doctors. There was a provision for filling vacancies among the trustees. The beneficial interests were held by the transferors and were to be transferable by them, subject to an option in the other beneficiaries to buy before there should be any transfers to outsiders. During the taxable years in question, the transferors were the only beneficiaries. Thus, this organization had provisions for continuity of life and modified transferability of interests but did not really have centralization of management or limited liability. The Court, however, thought that the four characteristics of continuity, centralization, limited liability, and transferability were sufficiently present so that the organization should be treated as an association, subject to the corporate income tax.

The question of whether a professional partnership can be treated as an association became acute when pension plans became popular. Then it was seen that the concept of an association might be turned against the Commissioner. In *United States v. Kintner,*[16] a partnership of doctors dissolved and reorganized as an unincorporated association. Eight doctors became members. They delegated management to an executive committee of five. It was provided that the interests of members should be non-assignable and that the death or retirement of a member would not dissolve the association. There seems to have been no attempt to protect the members of the group from personal liability.

The court held that the clinic was an association for tax purposes and that its pension plan, which included primarily the doctors who were the members of the association, was a qualified plan. The court said:

> It should be added that it would introduce an anarchic element in the federal taxation if we determined the nature of associations by State criteria rather than by special criteria sanctioned by the tax law, the regulations and the

15 82 F. 2d 473 (7th Cir. 1936).
16 216 F. 2d 418 (9th Cir. 1954).

> courts. It would destroy the uniformity so essential to a federal tax system,—a uniformity which calls for equal treatment of taxpayers, no matter in what State their activities are carried on. For it would mean that tax incidences as to taxpayers in the same category would be determined differently according to the law of the State of residence.[17]

Recently, a similar decision was made by a federal district court in Texas.[18] In that case, a group of seven doctors formed an association to replace a partnership. Their motive, as found by the court, was to solve problems relating to a need for centralized management, limitation of liability of the individual doctors, continuity of life, and a better method of holding title to the property. They agreed to elect a board of directors of six, which was to appoint an executive committee of two to handle details, subject to control by the board of directors. Interests of the members were to be transferable, subject to an option in the group and the other members to buy at the offering price. It was provided that the members should not be liable for debts of the group or of any member until the assets of the group and of the defaulting member should be exhausted. Assets of the group were not to be distributed until the termination of the association, which was to last for 35 years. The agreement of the parties, then, purported to provide for centralization of management, continuity of life, and modified transferability of interests. It did not establish limited liability like that of corporate stockholders. The government took the position that the taxpayer, a member of the association, was taxable on his proportionate interests in a reserve fund set aside by the association and returned by it as corporate income. The court held for the taxpayer.

The government has not acquiesced in the *Kintner* or *Galt* decisions.[19] For a time, it held that if a partnership adopted the corporate form to get the benefits of a qualified pension plan, it was a partnership for all purposes.[20] Later it ruled that the mere fact that a group attempted to set up a qualified pension plan would not determine whether it was a partnership or an association.[21]

Now, proposed regulations have been issued.[22] Our present question, then, is: are those regulations consistent with the decided cases, and will it be practicable, under them, for a professional partnership to adopt such a form as to be able to establish a qualified pension plan? It seems generally to be assumed that, if a professional partnership can so reorganize as to be an "association," its members will be treated as "employees" under the provisions relating to pension plans, but at least one source has urged caution as to this.[23]

A striking feature of the proposed regulations is the following language:

> Although it is the Internal Revenue Code rather than local

17 216 F. 2d 418, 424 (9th Cir. 1954).
18 Galt v. United States, 175 F. Supp 360, 1959-2 U.S. Tax Cas. 73,513 (N.D. Tex. 1959). (The facts in this case are reported in U.S. Tax Cas. but not in F. Supp.).
19 The government appealed the *Galt* decision, but the appeal was dismissed on November 24, 1959. No further details as to the dismissal appear to be available.
20 Rev. Rul. 56-23, 1956-1 Cum. Bull. 598.
21 Rev. Rul. 57-546, 1957-2 Cum. Bull. 886.
22 Proposed Treas. Reg. § 301.7701, 24 Fed. Reg. 10450 (1959).
23 Tax Approaches, Charles D. Spencer & Associates, Inc., February, 1960.

law which established the tests or standards which will be applied in determining the classification in which an organization belongs, local law governs in determining whether the legal relationships which have been established in the formation of an organization are such that the standards are met. Thus, it is local law which must be applied in determining such matters as the legal relationships of the members of the organization among themselves and with the public at large, and the interests of the members of the organization in its assets.[24]

Although one might rationalize the language of the old regulations, which are quoted above, so as to render it consistent with that of these proposed regulations, the mood and emphasis of the Treasury Department seem definitely to have changed. It seems impossible to reconcile the language of the proposed regulations with that of the Supreme Court in *Burk-Waggoner Oil Ass'n v. Hopkins,* also quoted above, or with the fact that in the other cases the courts have looked only to the agreements made by the parties, without reference to the local law.[25]

To weigh the effect of the proposed regulations, however, we need to learn what standards they set up for determining whether an organization is an association. They state six standards:

i. Associates,
ii. An objective to carry on business and divide the gains therefrom,
iii. Continuity of life,
iv. Centralization of management,
v. Liability for corporate debts limited to corporate property,
vi. Free transferability of interests.[26]

The first two standards are common to partnerships and corporations, so that our problem centers around the meaning of the remaining four standards and the possibility of meeting them.

When does the organization have "continuity of life"? "An organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization."[27] The regulations state that, al-

24 Proposed Treas. Reg. § 301.7701-1(c), 24 Fed. Reg. 10451 (1959).
25 Bittker, The Corporation Income Tax 30 (1959).
26 Proposed Treas. Reg. § 301.7701-2(a), 24 Fed. Reg. 10451 (1959).
27 Proposed Treas. Reg. § 301.7701-2(b)(1), 24 Fed. Reg. 10451 (1959).

though the parties may agree that none of these events shall dissolve the organization, there is not continuity of life if under local law the organization may be dissolved by the occurrence of one of these events or by an act of a member of the group, even though that act is a violation of the agreement.[28] Under Colorado law, the expulsion of a partner, the death or bankruptcy of a partner, or an expression of the will of any partner at any time, although in violation of the agreement of the parties, dissolves a partnership.[29] Also, a partner or a purchaser of the interest of a partner can get a judicial decree dissolving a partnership.[30] Thus a Colorado partnership cannot meet the standard of continuity of life set by these regulations.

The next standard discussed by the proposed regulations is centralization of management. The regulations state that this standard is met if "any person (or group of persons which does not include all members) has continuing exclusive authority to make the management decisions necessary to the conduct of the business for which the organization was formed."[31] The regulations also state, however, that in the case of a general partnership an agreement that the powers of management shall be exclusively in a selected few is ineffective against outsiders without notice and that therefore a general partnership cannot meet this standard.[32] Here the regulations have stated the effect of local law, which seems odd, but they have done it correctly.[33] Thus the standard of centralization of management cannot be met.

Another standard is limited liability. It is said to exist "if there is no member who is personally liable for the debts of or claims against the organization."[34] Under Colorado law, however, all partners are liable for the debts of the partnership, so that this standard cannot be met.[35]

The last standard is that of transferability of interests. This requires that each member be able, without the consent of the others, to substitute an outsider for himself. He must be able to transfer all of the attributes of his position, not only his right to share in profits but also his right to participate in management.[36] The regulations recognize that members of a partnership may be unwilling to permit transfers of interests without having a right first to buy those interests for themselves. Thus it is stated that a modified form of transferability exists if there is such an option but that this form of transferability has less weight.[37] Under Colorado law, a partnership can make an effective agreement that a partner may assign his interest and that the assignee will step completely into the shoes of the transferor.[38] The difficulty here may be a practical one, that members of a law firm, because of the personal character of the relationship among the partners, may be unwilling to make such an

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28 Proposed Treas. Reg. § 301.7701-2(b)(2),(3), 24 Fed. Reg. 10451-2 (1959).
29 Colo. Rev. Stat. § 104-1-31 (1953). (Uniform Partnership Act, § 31).
30 Colo. Rev. Stat. § 104-1-32 (1953). (Uniform Partnership Act, § 32).
31 Proposed Treas. Reg. § 301.7701-2(c)(1), 24 Fed. Reg. 10452 (1959).
32 Proposed Treas. Reg. § 301.7701-2(c)(4), 24 Fed. Reg. 10452 (1959).
33 Colo. Rev. Stat. § 104-1-9 (1953). (Uniform Partnership Act, § 9).
34 Proposed Treas. Reg. § 301.7701(d)(1), 24 Fed. Reg. 10452 (1959).
35 Colo. Rev. Stat. § 104-1-15 (1953). (Uniform Partnership Act, § 15).
36 Proposed Treas. Reg. § 301.7701-1(c)(1), 24 Fed. Reg. 10452 (1959).
37 Proposed Treas. Reg. § 301.7701-1(e)(2), 24 Fed. Reg. 10452 (1959).
38 Colo. Rev. Stat. §§ 104-1-18, 27 (1953). (Uniform Partnership Act, §§ 18, 27).

agreement, even though they provide that any interest must be offered to present partners before it is transferred to an outsider.[39]

Must a group qualify in respect to all of the standards set by the regulations to be treated as an association? Apparently, it need not. The text states that "[a]n organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or trust."[40] The regulations include examples which indicate that an organization may be treated as an association if it has the modified form of transferability of interests and meets two of the standards of continuity of life, centralization of management, and limited liability. Modified transferability plus only one of the other characteristics, such as centralized management, is treated as insufficient.

Thus, the proposed regulations look to local law to determine whether the standards are met, and under Colorado law those standards cannot be met. This situation is not peculiar to Colorado. Our statutes are based on the Uniform Partnership Act, which is law in at least 38 states and Guam. The same results are likely to occur in other states, since the act is largely in accord with the common law.[41]

Would it be possible to comply with the proposed regulations by adopting a form that would not be that of a general partnership under local law but would be that of a limited partnership or a

39 Stutsman, *New Kintner Regs. not Retroactive, Give Specific Criteria to Test Partnership,* 12 J. Taxation 174, 176 (1960).
40 Proposed Treas. Reg. § 301.7701-2(a)(1), 24 Fed. Reg. 10451 (1959).
41 Crane, Partnership and Other Unincorporated Associations 7 (2nd ed. 1952).

trust? This seems doubtful. Limited partners contribute property to the firm rather than services, so that a limited partnership does not appear adaptable to the practice of law.[42] Is the use of the trust form a better possibility? Under principles of trust law, a business can be organized in such form as to provide continuity of life, centralization of management, limited liability, and transferability of interests, within the meaning of the proposed regulations.[43]

Here, however, we meet objections based on legal ethics. The Committee on Professional Ethics of the American Bar Association has already ruled that it would be improper for members of a law firm to transfer their interests in the firm to a trust which would employ the members of the firm and create a pension or profit-sharing plan for their benefit.[44] The committee thought that the specific proposal before it would not create a trust, because of control over the trustees reserved to the beneficiaries. At some length, however, the committee argued that even if a trust were created the arrangement would violate several of the Canons of Professional Ethics.

Canon 33 prohibits misleading use of a firm name. The committee thought that the proposed plan would violate this canon by giving the impression that the firm was a partnership, rather than a trust. A potential client, if he considered the problem of liability for malpractice, might suppose that all members of the firm would be personally liable for the act of any member. This supposition seems to be correct in the case of a general partnership; if the firm were a trust, however, only the trustees and the corpus, through the right of the trustees to reimbursement, would be liable for the acts of lawyers employed by the trust. Thus there may theoretically be some merit in this objection by the committee. That this objection has practical importance seems doubtful.

Canon 34 forbids splitting fees with laymen. The committee thought that this canon would be doubly violated by the proposal. First, the fees would be paid to the trustees and would be used by them, in part, to pay clerks and stenographers. Second, beneficial interests in the trust, through death or otherwise, might pass to laymen. The first objection seems weak, since part of the fees received by a lawyer generally do go to his clerks and stenographers. The second might be avoided by prohibiting transfers of beneficial interests to laymen and by making an agreement for the purchase of the interest of any retiring member of the firm, either by the firm or by its members.

Canon 35 prohibits the intervention of a lay agency between a lawyer and his client. The committee thought this canon would be violated by a provision that all fees be paid to the trustees. The proposal would have required the trustees to be lawyers, so it is dif-

42 Colo. Rev. Stat. § 104-2-4 (1953). (Uniform Limited Partnership Act, § 4).

43 Proposed Treas. Reg. § 301.7701-4(b),(c) example 2, 24 Fed. Reg. 10454 (1959). It might be noted that the limited liability available in the case of a trust relates to liability for acts of the trustees, not to liability for the acts of beneficiaries rendering personal services. Thus, it seems improbable that the operation of a legal or medical firm through a trust device, even if otherwise feasible, would protect a member of the firm from liability for his own malpractice. As a practical matter, this seems to be the more significant liability for a doctor or a lawyer. For the purpose of classifying a group as an "association" however, the lack of personal liability for acts of the trustees may be the significant factor.

44 Opinion 283, 36 A.B.A.J. 870 (1950).

ficult to see how it would violate this canon any more than the usual operation of a large law firm.

It may be that the objections raised by the Committee on Professional Ethics are not very weighty. Its opinion must be considered, however, and we should also keep in mind that the objections made to the use of the form of a trust seem equally applicable to an imitation of corporate form.

Assuming that the Committee on Professional Ethics might change its opinion or that it might approve a different plan, is there any possibility of solving the tax difficulties in the way of establishing a qualified pension plan for a law firm? If the proposed regulations become final in their present form, the courts may hold them invalid. Their emphasis on local law is inconsistent with the language of the Supreme Court and the Court of Appeals for the Ninth Circuit. Furthermore, that emphasis is inconsistent with the results in the *Pelton, Kintner,* and *Galt* cases that involved groups of professional men. The leading *Kintner* case, dealing with the taxable year 1948, arose in Montana, where the Uniform Partnership Act had been adopted in 1947. It would seem in some areas of federal taxation, the courts have given considerable weight to local law. For example, nothing is included in the gross estate of a decedent on account of a life estate held by him but created by another; state law governs as to whether the decedent in fact had a life estate.[45] It might be said, in general, that federal law determines the tax consequences of the rights and duties of a taxpayer, but state law is used to decide what his rights and duties are. The proposed regulations fit this approach. Anyone considering the possibility of contesting their validity ought to study other areas in which this problem of state versus federal law has arisen.[46] He should also consider the problem of whether the interpretation of the statute here has become so settled by the existence of regulations and decisions and the passage of time that the Treasury Department cannot change it prospectively.[47] The Treasury may revise the proposed regulations so as to make the provisions of the agreement among the parties govern, even though they may deprive members of a firm only of the right to take certain steps and not of the power.[48] It now seems more probable, however, that the Treasury definitely wants to discourage professional partnerships from adopting the form of an association. An Under Secretary of the Treasury has recently written that:

45 Helvering v. Rhodes Estate, 117 F. 2d 509 (8th Cir. 1941).
46 This subject is considered at length in 10 Mertens, The Law of Federal Income Taxation, §§ 61.01-61.09 (Zimet and Stern rev. 1958).
47 1 Mertens, The Law of Federal Income Taxation, §§ 3.20-3.25 (Zimet, Stanley, and Kilcullen rev. 1956).
48 For arguments that this should be done see: Saltz, *Associations*, 38 Taxes 187, 191 (1960); Stutsman, *New Kintner Regs. not Retroactive, Give Specific Criteria to Test Partnership*, 12 J. Taxation 174, 177 (1960); Net After Taxes, Vol. VII, No. 8, April 1960.

> The Internal Revenue Service has administrative problems in dealing with partnerships which attempt to be treated as associations in order to allow the members to obtain coverage under qualified pension plans. This constantly raises difficult questions of substance over form.[49]

Congress has had under consideration for some time a bill which would permit self-employed individuals to make deductible contributions to retirement plans for their own benefit. If such a bill becomes law, the interest of professional partnerships in the use of the form of an association may die, except where there are practical, non-tax advantages in that form. Fringe benefits other than pensions may be provided through the form of an association, but it is not known whether they alone would create substantial interest in the use of that form.

The Treasury has, however, opposed that bill, and now has made a counter-proposal. The gist of this proposal is that the provisions relating to pension and profit-sharing plans for employees be revised so that an individual proprietor or a partner may treat himself as an employee and participate in such a plan. There are several limitations in the proposal: 1. Participation would have to be open, on a non-discriminatory basis, to employees who are not owners of the business. 2. The owner could participate only if he performed personal services. 3. Contributions for the benefit of the owner would be limited, at least if none of his employees received substantial vested interests, and 4. the Treasury would like to abolish the present capital-gains treatment of distributions made in one year on termination of service. This change would apply to all pension and profit-sharing plans, regardless of whether the owner of the business is a participant. For this privilege, the Treasury proposes to substitute some type of averaging of income.

The limitations in the Treasury's proposal do not seem severe. At present corporations appear able to establish pension plans primarily for the benefit of the shareholder-employees, because they are permitted to exclude many other employees, such as those paid wages and those who have been employed for less than five years. Most law firms have few employees, especially with service of five years or more, and the inclusion of long-term employees would probably not be an unjustified hardship on a firm.

We do not, of course, know whether Congress will adopt the proposal of the Treasury Department. When it adopted provisions permitting unincorporated businesses to elect to be taxed as corporations, it specifically provided that a partner or proprietor of such a business shall not be considered an employee for purposes of the sections relating to employees' pension trusts.[50] The fact that this present proposal comes from the Treasury Department may make a substantial difference.

If this proposal is adopted, it seems to answer our problem. Lawyers will be able to participate in pension plans with substantial tax advantages, and they will not have to change their mode of operations or risk professional disapproval to do it.

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49 Letter of Under Secretary Fred C. Scribner, Jr. to Senator Harry F. Byrd, Chairman, Committee on Finance, April 1, 1960.
50 Int. Rev. Code of 1954, § 1361(d).

THE MIDDLE INITIAL

By PERCY S. MORRIS*

The Colorado attorney whose practice includes the examination of titles to property and the approval or rejection of such titles based on variences concerning middle names and initials is faced with a serious problem. A consideration of the Colorado cases in point may suggest some revision of his office procedure.

The problem of "what's in a name" arose early in Colorado in the 1872 case of *Doane v. Glenn*[1] when the court said:

> The next error assigned is the refusal of the court to allow plaintiffs to read in evidence the deposition of James W. Hanna. Several objections were made by the defendants, which we will notice in the following order:
>
> 1. The commission is to take the deposition of James H. Hanna, and the deposition taken is that of James W. Hanna.
>
> There is nothing in the first objection. In legal contemplation, the middle letter constitutes no part of one's name. The law knows but one Christian name, and the omission or incorrect insertion of a middle name or initial is immaterial in pleading; so also in a commission to take depositions.[2]

During the period between 1872 and 1957, there was no decision of the Colorado Supreme Court involving the question of a variance with respect to middle initials or names, but there were three decisions of the Colorado Court of Appeals relating to that question.

The first case was *German Nat'l Bank of Denver v. Nat'l. State Bank of Boulder*.[3] In that case the variance was between the name W. J. Motley, which appeared in a garnishment summons served on a bank, and W. G. Motley, the name of one who had an account in the bank. The Court of Appeals reversed a judgment against the defendant bank, saying in part:

> Out of these facts sprang the law which is found laid down in the early authorities, that the middle letter formed no part of the name of any person. In other words, in conformity with the then existing custom, the court said that a man was known by his first name, and accuracy in that respect was all that the law required. The law and the decisions, which were the outgrowth of the existing conditions of society, can manifestly have no application to our modern commercial organizations. The wide extension and rapid increase of population, the great and unprecedented growth of commercial transactions, have compelled the use of different forms, and the adoption of different methods to distinguish individuals. The middle name, or the middle letter, is as much a part of a man's name in this part of the present century as either his christian [sic] or his surname. The result is that the more modern authorities in the eastern and

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1 1 Colo. 495 (18/2), *rev'd on other grounds*, 88 U.S. (21 Wall.) 33 (1874).
2 *Id.* at 502.
3 3 Colo. App. 17 (1892).

> commercial states have adjudged that the middle letter, or the middle name, is as essential to the accuracy of the writ as either the christian [sic] or the surname.[4]

However, after having stated that the middle name or middle letter is as much a part of a man's name as either his Christian or his surname, the court proceeded to limit and confine its decision to that particular class of cases, namely, cases which involved garnishments of banks.

The same case[5] was again before the Court of Appeals following a retrial in which the court affirmed its former opinion and then proceeded to give additional grounds for this affirmation, all of which related exclusively to business practice in banking.

The third decision of the Court of Appeals was in the case of *Gibson v. Foster*,[6] where the court said:

> The middle name or initial in a person's name has become quite material in modern times, especially as a distinguishing identification of the person. Many persons now have the same Christian, or given, name, and the same patronymic, family or surname, and it is by the middle name or initial only, in many instances, that the person may be distinguished or identified in writing. . . .
>
> There is no presumption that Albert S. and A. L. Deleplane, or that A. S. and A. L. Deleplane, are the same person.

However, the language quoted above was probably dictum, since the court could have disposed of the variance in names without going into questions relating to the middle name or initial by basing its decision on the fact that only the initial A of the Christian name was used instead of the full Christian name Albert.

The great weight of authority supports the early holding of *Doane v. Glenn* that in legal contemplation the middle letter constitutes no part of one's name and that the law knows but one Christian name, and the omission or incorrect insertion of a middle name or initial is immaterial.

Mr. Patton, in his work on titles, says:

> It is an ancient rule that the law shall recognize but two names of an individual, the family or surname, and the given or Christian name. Under this rule, if two or more Christian names are used, the middle name, names, or initials are disregarded, and any discrepancy therein is immaterial. Of more general acceptance at this time is the holding that the insertion in one name and the omission in the other of a middle name or initial is immaterial unless the first name is itself an initial only. The rule came into existence at a time when few people had more than two names, but several courts now hold that in modern times a middle name or initial has become an essential part of the given name, for the purpose of distinguishing persons, and that it should be considered in determining the question of variance. Whether justified by the decisions of their own state or not, it has become a very general practice for ex-

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4 *Id.* at 19.
5 German Nat'l Bank of Denver v. Nat'l State Bank of Boulder, 5 Colo. App. 427 (1895).
6 24 Colo. App. 434, 436 (1913).

aminers to require additional evidence of identity when the records show a difference in middle names or initials, or show their insertion in one only of two otherwise similar names.[7]

Attorneys in Colorado, in examining abstracts of title, have uniformly considered the middle initial or the middle name to be as much a part of a person's name as the Christian name, or initial, in spite of the *Doane v. Glenn* decision. According to Mr. Patton, this would seem to be in accordance with the general practice for examiners "whether justified by the decisions of their own state or not." This practice of the Colorado attorneys is undoubtedly based upon the realities of the modern day as against a legal fiction based upon conditions existing in the Middle Ages.

However, the problem has been pinpointed by the Colorado Supreme Court in two comparatively recent decisions, in which the rule of *Doane v. Glenn* is again applied.

7 1 Patton, Titles § 76 (2d ed. 1957).

The first of these two decisions is *Nelson v. District Court.*[8] That case involved the variance of the name Elizabeth G. Nelson, which was signed to the receipt for a registered letter that was sent to secure service of process, from the name Elizabeth L. Nelson, which appeared in the complaint as the name of the defendant. The court said:

> The middle initial is not the test; it is no part of a person's name.
>
> The middle initial is no part of a person's name, according to the weight of authority, and, therefore, no importance attaches to its omission, or to the insertion of an erroneous initial in place of the correct one. A similar mistake made by the insertion of a middle initial where the correct name contains no middle initial is likewise regarded as immaterial. . . . 42 Am. Jur., page 86, sec. 99.[9]

That decision was followed by the supreme court in its opinion in the case of *Clark v. Nat'l Adjusters, Inc.*[10] In that case a money judgment by default had been entered in a previous action, and the defendant against whom the judgment was obtained brought a suit to have the judgment vacated and to set aside the proceedings that had been taken subsequent to such judgment. One of her grounds of attack upon the service of process in the first action was that she was improperly named in the summons, the name therein having been Odessa Clark and not Odessa W. Clark. In passing upon such ground, the court said, "The omission in the summons of the plaintiff's middle initial was immaterial. This court has held that in legal contemplation such initial constitutes no part of one's name, the law knowing but one Christian name."[11]

The variance in each of the three decisions of the Colorado Supreme Court did not involve a full middle name. In *Doane v. Glenn*[12] and in *Nelson v. District Court*[13] there was a difference in the middle initials. *Clark v. Nat'l Adjusters, Inc.*,[14] involved the omission of the middle *initial*. The *Nelson* decision made no reference to middle names, but, in *Doane*, the court used the phrase "and the omission or incorrect insertion of a middle name or initial" and in both the *Doane* and *Clark* cases, the court used the phrase "the law knows but one Christian name."

However, if these decisions are to be considered applicable to deeds, encumbrances and other instruments affecting title to real estate, they must be considered to be applicable not only to the insertion or omission of a middle initial but also to the insertion or omission of a middle name and to the use of a middle name in one instrument that is entirely different from the middle name used in the other instrument. If, as the Colorado Supreme Court said, "the law knows but one Christian name" and if such holding is applicable to instruments affecting title to real estate, it logically follows that as long as the Christian name and the surname are the

8 136 Colo. 467, 320 P.2d 959 (1957).
9 *Id.* at 480, 320 P.2d at 962.
10 140 Colo. 593, 348 P.2d 370 (1959).
11 *Id.* at 595, 348 P.2d at 372.
12 1 Colo. 495 (1872).
13 *Supra* note 7.
14 *Supra* note 9.

same, any variance in the middle name must be disregarded as being immaterial.

None of these decisions related to variances in names appearing in deeds, deeds of trust and other instruments affecting title to real estate. Each of them involved proceedings in lawsuits. In *Doane* the variance was in a commission for the taking of a deposition; in *Nelson* the variance was in the receipt for a registered letter sent to secure service of process; in *Clark* the variance was in the summons. In *Doane* the court said "the law knows but one Christian name, and the omission or incorrect insertion of a middle name or initial is immaterial in pleading, so also in the commission to take depositions," but in *Nelson* and in *Clark* the opinions contained no language which prevented the rules laid down therein from being general rules applicable in all situations, including those in which the instruments affect title to real estate.

Assuming that these decisions are applicable to instruments affecting title to real estate, none of them would impair the effect of the Colorado curative statute.[15] That statute remedies variances between names appearing in two instruments, both of which have been recorded for more than three years, in three situations, namely: (1) where the full Christian name appears in one instrument and only the initial letter of that Christian name appears in the other; (2) where the full middle name appears in one name and only the initial letter of that middle name appears in the other; and (3) where the initial letter of a middle name appears in one name and does not appear in the other. The three cases would not be applicable to a variance arising from the first of these, namely, the full Christian name appearing in one instrument and only the initial letter of that Christian name appearing in the other, because the decisions relate only to the middle name or the middle initial. If applicable to instruments affecting title to real estate, the decisions would render immaterial the other two variances, namely, the variance arising from a full middle name appearing in one name and only the initial letter of that middle name appearing in the other, and the variance arising from the initial letter of a middle name appearing in one instrument and not appearing in the other, because, under such decisions, any variance with respect to the middle name or middle initial would be immaterial.

However, if such decisions are applicable to instruments affecting title to real estate, they would have a much greater effect upon

15 Colo. Rev. Stat. § 118-6-16 (1953).

discrepancies in middle names than does the statute. In the first place, under the statute, both instruments must have been of record for at least three years, whereas, by the decisions, the variance would be considered immaterial irrespective of the record date. Secondly, the variances remedied by the statute are variances which are not inconsistent with each other, because, in order that the statute may remedy the defect there must be a situation in which the middle initial in one instrument is the initial of the middle name that appears in the other instrument, or a situation in which the middle initial appears in one name but does not appear at all in the other name, whereas, under the decisions, the variance would be considered immaterial no matter how inconsistent the names might be with each other, so long as the Christian name and the surname are the same. For example, if the names of the grantee in one instrument appeared as John Jones Smith and the name of the grantor in the subsequent instrument appeared as John Robertson Smith the statute would not apply, but the decisions would render the variance immaterial because they apply no matter what the discrepancy in the middle names and initials might be. Such a result would seem to be entirely unacceptable to the overwhelming majority of attorneys.

Colorado attorneys cannot ignore these decisions. If after examining the abstract for the purchaser and in accordance with the general practice of attorneys in this state, one should reject the title as unmarketable because of a discrepancy such as in the example cited above, he might find himself faced with the necessity of having to sustain his rejection of the title in a suit brought by the purchaser to recover the deposit that had been paid on the purchase price, by convincing the court that these three Colorado Supreme Court decisions are not applicable to variances in middle names or middle initials in instruments affecting the title to real estate.

Three alternative courses should be given consideration by the attorneys of Colorado. The first of these is for the attorneys of the state to accept the three decisions as being applicable to instruments affecting the title to real estate and to pass as immaterial all variances of every nature in middle names and initials in instruments affecting title to real estate. The second course is to have presented to the Colorado Supreme Court for its determination the question of whether such three decisions are applicable to instruments affecting title to real estate. The third course is to seek legislative enactment of a statute which expressly sanctions the general practice of Colorado attorneys, which now exists and has existed for many decades, of considering the middle name and the middle initial as material parts of a person's name.

In my opinion, the first course, that of accepting the decisions as applying to instruments affecting title to real estate, is unthinkable, since it would not only upset the general practice of attorneys in this state, but it would ignore the realities of the modern age in which the middle name or initial must be considered as a part of the identification of a person. It would result in great confusion, particularly with respect to the necessity of including in abstracts those judgments against, wills of, and decrees of heirship with respect to persons having the same Christian name and surname but different middle initials or middle names as compared with the names of the owners of record of the properties.

The second course, that of securing a determination from the court of the question of whether the three decisions are applicable to variances in names in instruments affecting title to real estate, is also impracticable. A case involving this question would require several years of litigation if commenced in the district court and reviewed on writ of error and in the meantime, the confusion and uncertainty would continue to exist.

The most practical and logical solution is through legislative action. The Legislature could resolve the problem simply by adding the following language at the beginning of the 1953 Colorado Revised Statutes, Sec. 118-6-16: "The middle name or the initial of a middle name appearing in a name contained in an instrument affecting title to real estate or in a signature or an acknowledgment thereto shall be deemed *prima facie* to be a material part of such name"; and by which amendment there are also inserted the words "Provided, however, that" at the beginning of the first sentence of said section as it now reads. Such a statute would be consistent with the reasoning of the Colorado Court of Appeals in *German National Bank of Denver v. Nat'l. State Bank of Boulder*[16] and in *Gibson v. Foster.*[17] The validity and constitutionality of such amendment would be unassailable, because it would relate to the *prima facie* presumption of identity of persons resulting from identity of names, and therefore would merely state a rule of evidence. Furthermore, such amendment might be enacted in the session of the Legislature which begins in January, 1961 which would avoid a long period of uncertainty.

16 3 Colo. App. 17 (1892).
17 24 Colo. App. 434 (1913).

SECTION 24 – RENEWAL RIGHTS, SURVIVORS AND CONFUSION

By JOHN RITTENHOUSE, JR.‡

This paper was awarded the First Prize of $150 in the 1960 Nathan Burkan Memorial Competition at the University of Denver College of Law and the Second Prize of $500 in the national copyright writing competition. It is published through the courtesy of the American Society of Composers, Authors and Publishers.

I. INTRODUCTION

> Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing books without the consent of the authors and proprietors . . . to their very great detriment, and too often to the ruin of them and their families; for preventing such practices for the future, and for the encouragement of learned men to compose and write useful books, be it enacted . . . —Act of 8 Anne, ch. 19 (1710).

England in the days of Queen Anne foresaw the burgeoning of the fields of literary endeavor on a scale not theretofore known to the world. The advent of a workable, moveable-type printing press more than two hundred years before had seen to that. No longer was the onus of dissemination of literary fruits to an eager world placed upon the hunched shoulders and bleary eyes of monks laboring within the grey walls of a monastary. It is most unlikely, however, that good Queen Anne and her charges could have envisioned the mass media for the propagation of the Arts as we know them today.

The impact of the "terrible trio" of the entertainment field—the sightless but not soundless purveyor of audio Arts, Radio; the celluloid gobbling marvel, Movies; and that one-eyed, all-seeing Cyclops, Television—upon an awed twentieth century literary elite has been radical. The greedy maws of the terrible trio constantly place ever-widening demands upon hapless authors and composers. The result, aside from a wide variety of works ranging from trash to classic, has been the placement of an additional burden upon the virtues and the vices of the provisions of our prevailing copyright laws.

The sole source of congressional power to legislate in a protective way for the betterment of authors and composers derives from that section of the United States Constitution allowing the legislative branch of the national government ". . . to promote the Progress of Science and useful Arts, . . ."[1] From that slim reed stem our present day copyright statutes.

The major purpose of this paper will be to point out the shortcomings of current copyright laws of the United States in the area

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1 U.S. Const., Art. I, § 8, the full text of which is: "The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their Writings and Discoveries."

of survivorship and renewal rights. In this all-important sector of the Copyright Act,[2] one section is primarily controlling.[3]

The evolution of Section 24 of the present act has been a long and tortuous one dating back to the original Copyright Act of 1790.[4] The first major revision of the copyright statutes of interest in the field of renewal rights came in the year 1831.[5] The addition of specific survivorship rights to the author's widow and children, if they had remained alive beyond his life span, as stated in the report of the Committee on the Judiciary of the House of Representatives,

> . . . was 'chiefly to enlarge the period for the enjoyment of copy-right, and there-by to place the authors in this country more nearly upon an equality with authors in other countries. . . . In the United States, by existing laws, a copyright is secured to the author, in the first instance, for fourteen years; and if, at the end of that period, he be living, then for fourteen years more; but if he be not then living, the copy-right is determined, although by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them.' Register of Debates, vol. 7, appendix CXIX.[6]

This tangible manifestation of legislative intent stands as one of the few guideposts of substance by which we may trace a course through the shoals and murky waters of an insubstantial segment of the law.

Before making an attempt to gain an insight on the judicial interpretations levied upon this section of copyright law, it may be well to pause and assay the reasons for the relative paucity of re-

2 Copyright Act, 17 U.S.C., § 1 (1958).

3 Copyright Act, 17 U.S.C., § 24 (1958). Duration; renewal and extension. "The copyright secured by this title shall endure for twenty-eight years from the date of first publication, whether the copyright bears the author's true name or is published anonymously or under an assumed name: *Provided,* That in the case of any posthumous work or of any periodical, cyclopedia, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the original author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further,* That in default of the registration of such application for renewal and extension, the copyright in any work shall be determined at the expiration of twenty-eight years from first publication."

4 Copyright Act of 1790, ch. 18, 1 Stat. 124, provided for a term of 14 years from date of recording title of work to be copyrighted in the clerk's office of the district court. A renewal for a period of 14 years was secured by this act to the author or authors living at the expiration of the first term or their executors, administrators, or assigns.

5 Copyright Act of 1831, ch. 16, 4 Stat. 436, the original term for which the copyright was secured was extended to 28 years. Terms of renewal remained at 14 years. The privilege of renewal under the Act was granted to the author, or if dead, then to his widow or children.

6 Fisher Music Co. v. Witmark & Sons, 318 U.S. 643, 651 (1943). The Court said: [T]he Copyright Act of 1831 merely enlarged the benefits of the copyright; it extended the length of the original term and gave the author's widow and children that which theretofore they did not possess, namely, the right of renewal to which the author would have been entitled if he had survived the original term. The petitioners attach much significance to a sentence appearing in the report of the committee: 'The question is, whether the author or the bookseller should receive the reward.' The meaning of this sentence, read in its context, is quite clear. By providing that, if the author should not survive the original term, his renewal interest should, instead of falling into the public domain, pass to his widow and children, Congress was of course preferring the author to the bookseller. But neither expressly nor impliedly did the Act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal. That the Act contained no such limitation was accepted without question by both the courts . . . and by the commentators . . . . Representative Ellsworth, who submitted the committee report on the bill that became the Copyrigh Act of 1831, himself stated unequivocally that an agreement to assign the renewal was binding upon the author.

corded early opinions. Prior to the advent of the terrible trio, there were few instances in which a work, be it musical composition or literary endeavor, had the requisite durability necessitating protection beyond the original term. Then as now, the public taste for such "popular works" was exceedingly fickle. As a result, sufficient pecuniary reasons for litigation were generally lacking.

The dawn of the twentieth century saw abrupt reversal of this calm and the courts found themselves assailed with cases bearing upon renewal and survivorship matters. The hapless judges found themselves ill-equipped in a statutory sense to deal with a problem that was primarily statutory in nature. Few cases of record were present for them to apply the revered doctrine of *stare decisis*. In such circumstances all that could logically be hoped for was a liberal application of the doctrine of common sense on the part of the courts. Whether such hope was in fact fulfilled is a matter for conjecture.

The first major case for consideration in this field of copyright was that of *Wheaton v. Peters*.[7] Henry Wheaton was the author of twelve books of reported cases argued before the Supreme Court of the United States. He had sold his rights in the volumes to a publisher. Upon the expiration of the first term of copyright, a transferee of the rights of the original publisher, acting as agent for the author, renewed the copyright. In so doing, he failed to deposit the required copies with the Library of Congress.

After expiration of the first term, the defendants published a series of court reports in which Wheaton's first volume appeared verbatim. The lower court dismissed the action upon defendant's contention that there had been no infringment since there had not been complete compliance with the renewal requirements. In upholding the lower court, the Court rejected the plaintiff's assertion that even if there had not been proper compliance with the statutes, there still existed a common law copyright. The Court indicated that,

> From the authorities cited in the opinion of the court, and others referred to, the law appears to be well settled in England that, since the Statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. . . .
>
> That an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by obtaining a copy endeavors to realize a profit by its publication, cannot be doubted but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.
>
> That a man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only, *except by statutory provision*, under the rules of property which regulate society, and which define the rights of things in general.[8]

It will thus be seen at the outset, that the Court recognized that the granting of protection in the form of a limited monopoly (in time)

7 33 U.S. (8 Pet.) 591 (1834), *rev'd.*, 33 U.S. (8 Pet.) 725 (1834).
8 *Id.* at 591 (Emphasis added).

was an artificial concession and therefore not to be granted any aid without the four corners of applicable statutes. This basic premise will be seen to pervade the thinking of the courts today.

Such an attitude on the part of the courts stems, in large measure, from the old common law concept that anything which was such a product of mental labors was incorporeal in nature and incapable of possessing any right inherent in the ownership of tangible property. This thought persists even today in that our current copyright cases deem an idea *per se* as not capable of copyright.[9]

A consideration of the last link in the basic statutory chain of copyright legislation to date bearing upon renewal rights is now in order. The pressures of the vague and insubstantial financial position in which authors were placed eventually came to be known to persons in positions of authority in the national government. President Theodore Roosevelt, in his message to Congress in 1905, indicated:

> Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than 12 acts for the purpose have been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. . . .[10]

The House Committee Report which accompanied the House Bill number 28192 (later to be known as the Copyright Act of 1909) to the Congress in February 1909, indicated that the legislators had been thinking in terms of lengthening and strengthening the hold which an author and the natural objects of his bounty could exert upon the fruits of his labors.[11] The committee also manifested an intention to create a new procession of persons, in addition to the author, who could succeed to the renewal rights if the author had

9 See Baker v. Selden, 101 U.S. (11 Otto) 99 (1879).

10 H.Doc. 1, 59th Cong., 1st Sess., pp. LII (1905).

11 H.R. Rep. No. 2222, 60th Cong., 2d Sess. pp. 14-15 (1909), "Section 23 deals with the term of the copyright. Under existing law the copyright term is twenty-eight years, with the right of renewal by the author, or by the author's widow or children if he be dead, for a further term of fourteen years. The Act of 1790 provided for an original term of fourteen years, with the right of renewal for fourteen years. The Act of 1831 extended the term to its present length. It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right.

The present term of twenty-eight years, with the right of renewal for fourteen years, in many cases is insufficient. The terms, taken together, ought to be long enough to give the author the exclusive right to his work for such a period that there would be no probability of its being taken away from him in his old age when, perhaps, he needs it most. A very small percentage of the copyrights are ever renewed. All use of them ceases in most cases long before the expiration of twenty-eight years. In the comparatively few cases where the work survives the original term the author ought to be given an adequate renewal term. In the exceptional case of a brilliant work of literature, art, or musical composition it continues to have value for a long period, but this value is dependent upon the merit of the composition. Just in proportion as the composition is meritorious and deserving will it continue to be profitable, provided the copyright is extended so long; and it is believed that in all such cases where the merit is very high this term is certainly not too long."

died.[12] The committee not only formulated the groups to accede to the privilege but additionally ranked them in descending order of priority. To this latter provision and its wording, we owe many of the current cases in the field of copyright litigation.

With the adoption of this extensive revision of the copyright law of the United States in 1909, we reach the point where we must turn away from the formulation of the statutes themselves. A scrutiny of the application given these words by the various courts of the United States follows.

Basically, our copyright law remains the same structure today as that adopted in 1909. True, here and there a word or phrase has been deleted.[13] The Copyright Act has been codified.[14] Nonetheless, the structure and philosophy of the act remain intact. This may serve to strengthen the validity of a survey of the cases arising thereunder from the act's adoption to the present.

There have been attempts in Congress over the course of the intervening years to interpose another general revision of the copyright statutes.[15] Up to the present day, they have come to naught; the act remains essentially intact.

II. AUTHORS, NATURAL AND UNNATURAL OBJECTS OF THEIR BOUNTY

The privileges of copyright are completely statutory in nature and thus only those persons other than the author as enumerated by the statute are entitled to the renewal term of a copyright.[16] Early cases took the view that any prior assignment of renewal

12 H.R. Rep. No. 2222, 60th Cong., 2d Sess., pp. 14-15 (1909), "Your committee do not favor and the bill does not provide for any extension of the original term of twenty-eight years, but it does provide for an extension of the renewal term from fourteen years to twenty-eight years; and it makes some change in existing law as to those who may apply for the renewal. Instead of confining the right to renew to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of such author, if the author be not living, or if such author, widow, widower, or children be not living, then to the author's executors, or, in absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal."

13 Copyright Act of 1909, § 23, the words "when such contribution has been separately registered", which appeared in the second proviso after the words "composite work", were deleted by Copyright Act of 1940, 54 Stat. 51.

14 Made into positive law by the Copyright Act of 1947, ch. 391 § 1, 61 Stat. 652, which provided in part that: "Title 17 of the United States Code entitled 'Copyrights' is codified and enacted into positive law and may be cited as 'Title 17, U.S.C. § ...'."

15 *Hearings Before the House Committee on Patents* (General Revision of the Copyright Law), 72nd Cong., 1st Sess., (1932) 547 pps.; *Hearings Before the House Committee on Patents on H.R. 10976 a Bill to Amend and Consolidate the Acts respecting Copyright and to Codify and Amend Common-law Rights of Authors in their Works*, 72nd Cong., 1st Sess., (1932) 229 pps.; *Hearings Before the House Committee on Patents for Revision of Copyright Laws*, 74th Cong., 2nd Sess., (1936) 1560 pps.

16 Black v. Henry G. Allen Co., 56 Fed. 764 (S.D. N.Y. Cir. 1893); White-Smith Music Pub. Co. v. Goff, 187 Fed. 247 (1st Cir. 1911); Southern Music Pub. Co. v. Bibo-Lang, 10 F. Supp. 975, (S.D. N.Y. 1935); Shapiro, Bernstein & Co. v. Bryan, 27 F. Supp. 11 (S.D. N.Y. 1939).

rights on the part of the author was of purely contractual flavor and should be upheld as against any of the enumerated survivors of the author.[17] More recent cases have completely abandoned such a view, unless the author himself be in fact alive at the commencement of the renewal period.[18]

Should the author survive until the commencement of the renewal period, a prior valid assignment of his renewal expectancy can serve to compel him to take out a renewal application. Further, a trust will be impressed upon him to hold such renewal right to the benefit of the assignee.[19]

In speaking further on the validity of assignments of renewal rights by authors, the Court through the medium of the *Witmark* case said:

> As stated in the report of the House Committee, this bill 'differs in many respects from any of the bills previously introduced.' Your committee believes that in all its essential features it fairly meets and solves the difficult problems with which the committee had to deal.
>
> The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests. If Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors or their renewal rights, it is almost certain that such purpose would have been manifested. . . .
>
> We agree with the court below, therefore, that neither the language nor the history of the Copyright Act of 1909 lend support to the conclusion that the 'existing law' prior to 1909, under which authors were free to assign their renewal rights if they were so disposed, was intended to be altered. . . .[20]

It seems clear that the Court will tolerate no attempt to hedge legally where a properly constituted agreement to assign the renewal right exists and the author remains alive when the expectancy ripens into reality.[21]

An examination of the status of a renewal right assignment by the author when death intervenes reveals differing results. Since

17 Paige v. Banks, 13 U.S. (13 Wall.) 608 (1871). A court reporter contracted with a publisher to supply him with said reports and publisher was to have "copyright of said reports to them and their heirs and assigns forever." The Court indicated that the agreement was intended contractually to pass all the interest of the author in the work and therefore the publisher had become absolute owner, to the derogation of the author or his survivors.

18 Fox Film Corp. v. Knowles, 274 F. 731 (E.D. N.Y. 1921), *aff'd.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd.* 261 U.S. 326 (1923); Southern Music Pub. Co. v. Bibo-Lang, 10 F. Supp. 975 (S.D. N.Y. 1935); G. Ricordi & Co. v Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951).

19 M. Witmark & Sons v. Fred Fisher Music Co., 38 F. Supp. 72 (S.D. N.Y. 1941), *aff'd.*, 125 F.2d 949 (2d Cir. 1942), *aff'd.*, Fisher Music Co. v. Witmark & Sons, 318 U.S. 643 (1943). In 318 U.S. 643, 649, the Court said, "We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their interests. We are fortified in this conclusion by reference to the actual practices of authors and publishers with respect to assignments of renewals, as disclosed by the records of the Copyright Office. . . .

"The available evidence indicates, therefore, that renewal interests of authors have been regarded as assignable both before and after the Copyright Act of 1909. To hold at this late date that, as a matter of law, such interests are not assignable would be to subject all relevant aids to construction."

20 Fisher Music Co. v. Witmark & Sons, 318 U.S. 643, 648 (1943).

21 Witmark & Sons v. Fisher Music Co., 125 F.2d 949, 950 (1942). There the court said, in upholding the lower court decision, "It is to be conceded by all concerned that this creates only an expectancy, and that in any event the author must be alive on the first day of the twenty-eighth year in order to obtain a renewal. An assignment of this expectancy must rest also on survival."

the major aim of that provision of the act dealing with survivorship is to protect the author and those dependent upon him for a means of support, the statute will exclude the enforcement of a renewal assignment executed *in futuro* by the author where the death of the author has interposed.[22] The basic reasoning behind this result as effectuated by the statute is evidenced by the report which accompanied the Act of 1909 to the floor of the House.[23] It is probable that the thinking of the legislators was not as black as Mr. Justice Frankfurter characterized the contentions of a defense counsel when he said, "The policy of the copyright law, we are told, is to protect the author—if need be, from himself—and a construction under which the author is powerless to assign his renewal interest furthers this policy. We are asked to recognize that authors are congenitally irresponsible."[24] The fact remains that society places great emphasis upon a finished product of literary or musical composition with little regard for the well-being of the author either before or after the masterpiece is consumated. Possibly this view is fostered by the popular though fallacious picture of a starving and disease-ridden composer emerging from his stuffy garret with his masterpiece in hand. Only from the hands of such a man, so the myth continues, can come true inspiration and art. It is submitted that this is far from the concept likely to "Promote the Progress of Science and the Useful Arts."

The scheme of statutory renewal right represents a marked departure from the well-settled common law theories of descent and distribution. In truth, the term "renewal right" is a misnomer since the courts have construed this right to be a new power and not stemming from and attached to the original copyright term.[25] The renewal then, does in fact, constitute a new thing of value quite separate from the original registration and available only to the named individuals or classes set forth within the confines of the statutory provisions.[26]

The law sets out the following order in which the enumerated persons or classes may gain the right to renewal application and possession of the renewal term when issued thereunder:

1. The author;
2. The widow, widower, or children (if the author is dead);
3. The author's executor (if none of the persons named in subsection 2 survive);
4. If the author died intestate and is not survived by person or persons in subsection 2, then to next of kin.[27]

Within these four enumerated categories lie the seeds of innumerable litigations. These provisions have been damned for their gen-

22 Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951); Carmichael v. Mills Music, 121 F. Supp. 43 (S.D. N.Y. 1954).

23 H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

24 Whitmark and Sons v. Fisher Music Co., 318 U.S. 643, 656 (1943).

25 Miller Music Corp. v. Charles N. Daniels, Inc., 158 F. Supp. 188, (S.D. N.Y. 1957); *aff'd.*, 265 F.2d 925 (2d Cir. 1959); *cert. gr.*, 361 U.S. 809 (1959); *aff'd.*, 80 Sup. Ct. 792 (1960); Witmark & Sons v. Fisher Music Co., 38 F. Supp. 72 (S.D. N.Y. 1941), *aff'd.*, 125 F.2d 949 (2d Cir. 1942); *aff'd.*, Fisher Music Co. v. Witmark & Sons, 318 U.S 643 (1943); Silverman v Sunrise Pictures Corp., 273 Fed. 909, (1921).

26 Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469 (2d Cir. 1951); Fitch v. Shubert, 20 F. Supp. 314, 315 (S.D. N.Y. 1937) ". . . and that the plaintiff made application for renewal within one year before the initial term expired. This being the case, it is clear that the plaintiff acquired a new and independent right in the copyright, free and clear of any rights, interest, or licenses attached to the copyright for the initial term."

27 Copyright Act, 17 U.S.C., § 24 (1958).

erality, for their lack of specifically defined inter-relationships between the categories, and for their ability to confuse the wary and unwary alike. Yet they remain the tools of the trade. The only way to ascertain the extent of their efficacy has been to try them in a court of law. To the cases then we must turn in an attempted movement to glean the full significance of the statutes.

III. THE DEATH OF AN AUTHOR

Presuming the demise of an author or composer prior to the commencement of the twenty-eighth year of the original copyright term, it seems clear by both the legislative intent and the exact words of the statute that the "Widow, widower, or children" surviving will be entitled to the first right to renew.

One question arising under this first segment of Section 24 was whether the word "or" was meant in a disjunctive or conjunctive sense. Does a widow take in preference to any surviving children? Addressing itself to this important question in the 1956 case of *De-Sylva v. Ballentine*,[28] the Court through Mr. Justice Harlan said,

> Two questions are involved: (1) do the widow and children take as a class, or in order of enumeration, and (2) if they take as a class, does 'children' include an illegitimate child? Strangely enough, these questions have never before been decided, although the statutory provision involved have been part of the Act in their present form since 1870.[29]

In examining the first proposition, the Court indicated that the words "Widow, widower, or children" were unintentional substitutes of the word "or" for the word "and" between the time of the 1831 Act and the 1870 revision. The Court said,

> There is no legislative history, either when the 1870 Act was passed or in the subsequent sessions of Congress, to indicate that Congress in fact intended to change in this respect the existing scheme of distribution of the renewal rights. Rather, what scant material there is indicates that no substantial changes in the act were intended. It would not seem unlikely that the framers of the 1870 statute, interested in compressing the somewhat cumbersome phrasing of the prior Copyright Act, simply deleted the words 'and child' with the thought that the remaining phrase 'or children' expressed precisely the same result, leaving unaffected the rights of the author's children which had been the same for almost forty years.[30]

It would, therefore, seem settled under the present act that the widow and children are to take renewal rights as a class.

What do the courts hold to be a "child" within the meaning of the act? Holding that the brand of illegitimacy would only serve as a bar upon application of state law, the Court indicated that there

28 351 U.S. 570, 573 (1956).
29 *Id.* at 572.
30 *Id.* at 576.

is no law of domestic relations on a federal level.[31] Reference to the law of the forum state is therefore in order.

How long does a widow continue to retain her status as such? The only case of record to date passing upon this question has indicated that within the four corners of the copyright statute, the woman will continue in this status indefinitely, subsequent marriages notwithstanding.[32] Whether a widower would likewise remain so classified upon remarriage is subject to conjecture.

Presupposing the non-survivorship of the widow, widower, or children, what is the position of the executor named in a will? May he exert his powers under the statute to preclude a contractual obligation made by the author? In *Fox Film Corp. v. Knowles*[33] the Court faced this problem squarely. The question presented there was whether the author of a set of copyrighted poems, who had assigned all of his interest including authority to renew to a publishing house, could, by will at the time of his decease, transfer to his executor or legatee under the will the capacity to obtain the renewal right under the statute in derogation of his contract.

The Supreme Court of the United States, speaking through Mr. Justice Holmes, indicated an affirmative answer to the question. The Court specifically said, in regard to the status of the executor, that,

> [W]e see no sufficient reason for thus limiting the right of the executor. The section read as a whole would express to the ordinary reader a general intent to secure the continuance of the copyright after the author's death, and none the less so if the actual continuance was effected by creating a new estate, or if the beneficiaries in certain cases are pointed out. No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights as the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent we expressed.[34]

In placing the executor on a par with the other classes designated

31 DeSylva v. Ballentine, 351 U.S. 570, 580 (1956), the Court said, "We come then, to the question of whether an illegitimate child is included within the term 'children' as used in section 24.

"The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. . . . This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern. . . . To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships. The word 'children' although it to some extent describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law. We think it proper therefore, to draw on the ready-made body of state law to define the word 'children' in section 24."

32 Marks Music Corp. v. Borst Music Pub. Co., 110 F. Supp. 913 (D.C. N.J. 1953), at 917, "Defendants contend further that as Davis' wife remarried she lost her widow's rights to a renewal copyright. No such restriction is expressed or implied in the wording of the Act nor does any recorded case under the Act lend support to the theory. Authority to the effect that a woman who remarries retains her status as widow of her first husband abounds in analogous branches of law. . . ."

33 261 U.S. 326 (1923).

34 *Id.* at page 329.

in the statute, the Court has cleared up a question hitherto unanswered, possibly at the cost of raising a strong doubt in the mind of any publisher seeking to retain control over a work of literary endeavor or a musical composition.

The most recent case in which the Court undertook to review the position held by an executor in relation to an assignee-publisher came in April, 1960.[35] Involving litigation over the renewal rights to a well-known song titled, innocuously enough, "Moonlight and Roses", the case is possessed of an intriguing fact situation meriting discussion. The gist of it is as follows.

The Miller Corporation had gained control of the original copyright term through a predecesor firm. The original copyright was gained in January of 1925. In 1946, Ben Black, who, in collaboration with Charles N. Daniels, had written the words and music, assigned his partial interest in a copyright renewal to the plaintiff Miller. Later that year, plaintiff, seeking to protect himself from any rights of survivors, obtained separate assignments from the three brothers of Black of any respective interests which they might have in the renewal term. In 1950, Ben Black died before the commencement of the last year of the original term. He left no wife nor children. He did, however, die testate, naming his brother David as executor. The residuary estate was left to Black's nieces and nephews.

In 1952, during the last year of the original term, the executor applied for and was granted a renewal. The California Superior Court issued a decree ordering distribution of the estate proceeds. The nieces and nephews took the song rights and assigned them to Charles Daniels, the co-author.

In affirming the decisions of the lower courts granting to the executor the right to renewal privileges, Mr. Justice Douglas speaking for a slim majority of the Court said,

> We fail to see the difference in this statutory scheme between widows, widowers, children, or next of kin on the one hand and executors on the other . . . . True, these are disparate interests. Yet Congress saw fit to treat them alike. It seems clear to us, for example, that by the force of § 24, if Black had died intestate, his next of kin would take as against the assignee of the renewal right. Congress in its wisdom expressed a preference for that group against

[35] Miller Music Corp. v. Charles N. Daniels, Inc., 80 Sup. Ct. 792 (1960).

> the world, if the author, the widow, the widower, or children are not living. By § 24 his executors are placed in the same preferred position, unless we refashion § 24 to suit other policy considerations. Of course an executor usually takes in a representative capacity. He 'represents the person of his testator' . . . and that normally means that when the testator has made contracts, the executor takes *cum onere*. . . . It is clear that under this Act the executor's right to renew is independent of the author's rights at the time of his death. What Congress has done by § 24 is to create contingent renewal rights. . . . [W]hether it works at times an injustice is a matter for the Congress, not for us.[36]

The Court has thus clearly indicated that although injustice may result, the statute must govern. It would seem that the point has been reached where the publisher requires some legislative protection from the operations of such a train of events. Surely the public good requires the well-being of all facets of the industry, be they authors, composers, or publishers.

The dissent by Mr. Justice Harlan, accorded to by three of his fellow justices, showed strong dissatisfaction with the majority's application of Section 24. Indicating that distinctions should be drawn in the case of executors, the opinion went on to say,

> The important question, then, is to determine the extent to which Congress has seen fit 'to depart from the ordinary rules of succession.' In reaching its conclusion, the Court has, I think, overlooked critical distinctions between different clauses of the statute.
>
> . . . I agree that the provision for a 'compulsory bequest' to the author's widow and children should be held to bar effective assignment of renewal rights against them.
>
> But I cannot perceive of the applicability of this reasoning to the executor. . . . Surely we cannot infer legislative concern over the protection of the interest of whomsoever, of the large indeterminate class of potential legatees, should prove in fact to be chosen by the author.[37]

The dissent concludes by saying, "By undermining the sales value of renewal rights at the expense of the author and his immediate family this decision impinges on the very interests which the Copyright Act was designed to protect."[38]

What of the position of the administrator c.t.a? The legislative intent of the Congress seemed to have precluded an administrator from applying for renewal rights.[39] The majority of the reported cases have taken the position that it matters not whether the administrator be d.b.n. or c.t.a.[40] It is difficult, if not impossible, to follow a line of reasoning which would prevent the garnering of renewal rights under the statute merely because of the death of an executor, but this is what has happened. The only result is the entry into the public domain, at a premature date, of valuable rights

36 *Id.* at 795-96.
37 *Id.* at 797.
38 *Id.* at 798.
39 *Supra* at note 11.
40 White-Smith Music Pub. Co. v. Goff, 187 F. 247 (1st Cir. 1911); Danks v. Gorden, 272 Fed. 821 (2nd Cir. 1921); Silverman v. Sunrise Pictures Corp., 273 Fed. 804 (2nd Cir. 1923); *cert. den.* 262 U.S. 758 (1923).

for the lack of some intermediary figure capable of obtaining the right for a deserving legatee.

A comparatively recent case[41] shows a possible departure from this strict application of sanction against any type of administrator. The fact situation is striking since it involves litigation by a sister of an author to prevent an administrator c.t.a. from gaining access to the renewal rights for the author's various books. The named beneficiary by the terms of the deceased's will was his home town of Gibran, Lebanon. In upholding the decision of the lower court that the administrator c.t.a. was capable of gaining the renewal right for the legatee town, Judge Hand of the Second Circuit Court of Appeals indicated that such adminstrator did, in fact, stand in the shoes of an unnamed executor for the will.[42] He further indicated that the prior holding of this same circuit court of appeals in the *Sunrise* cases[43] regarding an administrator c.t.a.d.b.n. was merely dicta and therefore not binding upon the court.

The view expressed by these courts in the *Gibran* decision is likely to be lent added authority in view of the denial of certiorari by the Supreme Court. It would seem then that the position of such an administrator c.t.a. will henceforth allow him to exercise such powers with regard to copyright renewals as would be held by an executor.

According to statute, the author's next of kin are only entitled to renewal rights in the absence of a will.[44] This being true, little more than a vague hope accrues to one in this category in the presence of a will. In the face of the latest decision granting an administrator c.t.a. the same power of renewal as the executor, it would appear well near impossible for a next of kin to gain access to the right when a will is extant.

Should a will not be in existence and none of the higher ranked persons named by the statute survive, the door is opened for the next of kin to apply for renewal. Since he has been termed to be a member of a class, he holds the right in trust for whatever members of the next of kin that may come to the fore at a later date.[45] Under the circumstances, the renewal privilege gained by one of such status is probably the most uncertain of all. Its pecuniary rewards would remain in doubt for a substantial period of time. Any other members of the group would be fully as capable of assigning his rights to another publisher.[46] Under the circumstances, the value of such a right might be appreciably diminished.

The status of a proprietor under Section 24 indicates one possible means that can be adopted by a publisher to cope with possible interference with his right to continue publication during the renewal period. If an author or composer is placed on the proprietor's payroll, all works accomplished while on such a condition of em-

41 Gibran v. Alfred Knopf, Inc., 153 F. Supp. 854, *aff'd.* 255 F.2d 121, *cert. den.* 358 U.S. 828 (1957).
42 Gibran v. Alfred Knopf, Inc., 255 F.2d 121 (1957).
43 Silverman v. Sunrise Pictures Corp., 273 Fed. 909 (2nd Cir. 1921); Silverman v. Sunrise Pictures Corp., 290 Fed. 804 (2nd Cir. 1923), *cert. den.* 262 U.S. 758 (1923).
44 Copyright Law 17, U.S.C., § 24 (1958). See, Yardley v. Houghton Mifflin Co., 25 F. Supp. 361 (S.D. N.Y. 1938), concerning the ability of a next of kin to gain a valid renewal after the dismissal of the executor. It is to be doubted that this view is any longer valid in the light of the decision rendered in Gibran v. Alfred Knopf, Inc., 358 U.S. 828 (1957).
45 Silverman v. Sunrise Pictures Corp., 273 Fed. 909, *cert. den.*, 262 U.S. 758 (1923); Silverman v. Sunrise Pictures Corp., 290 Fed. 805, *cert. den.*, 262 U.S. 758 (1923).
46 Marks Music Corp. v. Vogel Music Co., 140 F.2d 266 (2d Cir. 1944).

ployment will accrue to the copyright control of the employer. Since in this regard the employer of such an author is denominated the proprieter of the work, the right to the renewal term as well as the original term will belong to him.[47] For the purposes of this section of the act, the word "proprietor" may be equated with the word "author" since all of the rights that we have heretofore identified with the author will also accrue to a bona fide proprietor in the author's stead.

Cases illustrative of this principle are not lacking on the records.[48] The results remain the same whether an artist paints a mural for a high school under contract to the board of education[49] or a song-smith turns out tunes for a music publisher on a weekly retainer.[50]

IV. Joint Works, Composite Works — Their Effect on Renewals

A joint work can best be described as the combined work product of two or more persons which, once completed and fitted together, remains from then on incapable of being identified except as a unified whole.[51] This is in contradistinction to a composite work, which is merely the conglomeration of several independent works placed in company with one another merely for the purpose of a single venture. An example of the latter would be an anthology of western novels.

In the case of a true joint composition, it matters not that the collaborators were unaware of the other's activities at the time of the work, had never had personal meetings with their co-worker, or indeed, were at all aware of his existence.[52] Here, mere intention of the parties governs and if a musical composer had intended that someone supply his composition with words, a joint work will ensue upon the application of the words to music.[53] The ramifications of a joint work in the field of renewal copyright privileges is more widespread than the simplicity with which they may be formed would tend to indicate.

The troubles start with the onset of the renewal period, especially if one or more of the joint owners has died in the meantime. Rival publishing companies find themselves ranged on the opposite sides of a courtroom, one possessing what he thought to be an effective assignment from the surviving author while the opposing publisher pins his hopes upon the assignment of the widow or child of the deceased co-author. From such chaos only dissatisfaction can ensue regardless of what solution the court indicates.[54] If two valid renewals are deemed to have been made, one of the lyrics and the other of the music, during the renewal period we have the anomal-

47 Copyright Act, 17 U.S.C., § 24 (1958).

48 Von Tilzer v. Vogel Music Co., 53 F. Supp. 191, *aff'd.* Cumm v. Vogel Music Co., 158 F.2d 516 (2d Cir. 1944); Bernstein & Co. v. Bryan, 36 F. Supp. 544, *aff'd.* 123 F.2d 697 (2d Cir. 1941).

49 Yardley v. Houghton Mifflin Co., 25 F. Supp. 361, *aff'd.* 108 F.2d 361 (2d Cir. 1939). The lower court said, at page 364, "When a man, hereinafter referred to as a patron, contracts with an artist to paint a picture for him, of whatever nature it may be, the contract is essentially a service contract, and when the picture has been painted and delivered to the patron and paid for by him, the artist has no right whatever left in it."

50 Tobani v. Carl Fischer, Inc., 98 F.2d 57, *cert. den.*, 305 U.S. 650 (1939).

51 Marks Music Corp. v. Vogel Music Co., 140 F.2d 266 (2d Cir. 1944).

52 Marks Music Corp. v. Vogel Music Co., 42 F. Supp. 859 (S.D. N.Y. 1942).

53 Shapiro, Bernstein & Co. v. Vogel Music Co., 161 F.2d 406, *cert. den.*, 331 U.S. 820 (1947).

54 Miller Music Corp. v. Charles N. Daniels, Inc., 80 Sup. Ct. 792 (1960); Norden v. Oliver Ditson Co., 13 F. Supp. 415 (D.C. Mass. 1936); Maurel v. Smith, 220 Fed. 195 (S.D. N.Y. 1915), *aff'd.*, 271 Fed. 211 (2d Cir. 1921).

ous result of an indivisible work that has been strangulated by division. Clearly, a result unhappy in its effect.

The major source of confusion in regard to composite works is in the area of the extent of protection granted to the individual component parts. The section of the act dealing with such works indicates that, "The copyright provided by this title shall protect all copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright."[55] It is to be noted that in dealing with the copyright of composite works the thing sought to be protected is not the individual compositions in themselves, but rather the format. Keeping such an approach in mind, it seems only logical that the compiler of the collection should apply for renewal rights in his own name as "author" as well as making application for the original term. Such is indeed the case.[56]

V. CONCLUSIONS AND RECOMMENDATIONS

What conclusions may we draw from the cases considered? It would be simple enough to say that the statutory provisions of the present Copyright Act need radical revision. The confusion sown by the vague framing of Section 24 is evident from the cases enumerated. The most recent cases reported indicate that future litigation in this field of renewal rights and survivors' benefits will only be limited by the fertile minds of copyright attorneys.

Indeed, copyright law in the United States is confronted with an anomalous situation. The basic premise is that copyright law in the United States is primarily and fundamentally a creature of statute. The long lines of litigants moving constantly through our crowded court seeking clarification by adjudication is no tribute to the framers of present day laws of copyright.

The entire purpose for the creation and maintenance of this form of limited monopoly called copyright is ostensibly to foster the public good by giving added incentive to would-be creators of such works. If this purpose is to be adequately fulfilled, a firm foundation for future reliance must be laid down in the form of controlling statutes. That such statutory certainty does not exist today

55 Copyright Act, 17 U.S.C., § 3 (1958).
56 Harris v. Coca-Cola Co., 1 F. Supp. 713, (D.C. Ga. 1932).

is evident from a survey of the cases. Hence the first conclusion is that we must replace our present provisions of the Copyright Act dealing with renewal rights and survivors' benefits.

Since the field of copyright control is completely statutory in concept and form, logic would indicate that this artificial animal must be nutured and cared for from within the bosom of a statutory system dealing in specifics. When and under what circumstances may an author assign his renewal rights? When do such rights cease to be an expectancy and become a vested interest? When does the renewal right vest in the enumerated classes of preferred individuals? These are but some of the flood of questions that should have been answered by the statutes but ended in the courts due to the yawning imperfections of the statutory provisions. Therefore our second conclusion is that any replacement statute must be drawn with particularity and addressed specifically to the problems likely to be encountered.

Must the United State's concept of renewal rights be preserved in any future statutes or is it preferable to adopt some scheme of copyright protection more nearly in line with those of the majority of other nations in the world? The proclaimed purpose of such renewal rights provisions has been two-fold: firstly, to protect the author from his own improvident business affairs; secondly, to protect his family at the time of his demise. It may well be asked if we cannot protect effectively these enumerated classes of individuals in another and simpler way. That other nations of the world utilize such systems is evident from an examination of the world copyright scene. Hence, the third conclusion is that we must abandon our present scheme of renewal rights and substitute a simpler and more workable device. In attempting to formulate such a device, this country should strive to find a replacement which will more nearly conform to our own concepts of descent and distribution and move more to the direction of the prevailing theories of world copyright protection.

How shall we accomplish such a radical departure from the old and, in this country, established pattern of copyright renewals, ineffectual assignments of renewal expectancies and supposedly vested renewal rights? Let us venture forth and attempt to rough out the possible form of a replacement statutory provision for Section 24.

I. The duration of the copyright term is declared to be determined by the length of the author's life plus a span of fifty years from the date of his death.

II. Should the author die possessed of his copyright, it shall devolve in the following manner:

A—to the author's widow or widower and children then living,

B—upon the death of all persons of Class "A", prior to or simultaneous with the author's death, then the profits derived from such copyright to the objects of the author's bounty as determined by the provisions of the author's will, if there be a will in existence. If there be no will, the profits shall accrue to those persons determined by the local laws governing descent and distribution.

C—Executors and administrators are to deal with the copyright for the benefit of those persons or things as determined to be in class "B".

III. Any person or group may purchase complete copyrights from the author during his lifetime and thereby attain full and lasting control thereof, PROVIDED THAT,

A—during the author's lifetime periodic arbitration may be had upon demand of the author at the end of each five year term dating from the execution of the original assignment of rights by the author. (Note—details of such arbitration are left out for the purpose of clarity of exposition.)

B—the right to such arbitration may not be waived except by a writing executed by the author during the fifth year of each arbitration period in question.

IV. Upon the death of an author, his successors in interest shall have the same right to make full, complete and lasting assignment of copyright privilieges EXCEPT that only members of Class "A" shall be privileged to invoke the provisions for periodic arbitration as to questions of readjustment of payments.

V. All joint ownership is hereby abolished in copyright matters. In its stead, the joint collaborators shall designate one of their number to be holder of the legal copyright. Such a holder shall be deemed to hold said right in trust for his collaborators. Upon such holder's decease or mental incapacity, the rights shall devolve to another member of the original group. The proportionate share of the deceased's equitable interest shall be dispensed in accordance with section II.

This skelatal form of a proposed replacement statute is far from flawless but it does serve to illustrate the fundamental thesis of this paper. Since the entire field of copyright law is statutory and artificial, let us make the most of it. Instead of finding ourselves chained to an obsolete piece of artificiality, let us cast it out and find a new scheme more in line with current thinking in the world. If we can make these copyright provisions work for the public good once more instead of simply contributing to the public confusion, we shall have recaptured our congressionally fabricated beast and placed him to laboring for the positive advancement of the Arts.

CASE COMMENT

FREEDOM OF SPEECH AND PRESS – ANONYMOUS COMMUNICATION

The defendant was convicted of violating a city ordinance[1] which prohibited the distribution of any handbill that did not indicate on its face the name and address of the author and identity of the individual sponsoring its distribution. The purpose of the handbill was to urge a boycott against certain merchants who would not offer equal employment opportunities to persons of various races, and to solicit membership in a consumer organization to fight this evil. The defendant urged that the ordinance violated his freedom of speech and press. The Superior Court of Los Angeles affirmed the conviction[2] and the United States Supreme Court granted certiorari.[3] The Supreme Court held that the ordinance was unconstitutional as an abridgment of freedom of speech and press secured against state invasion by the fourteenth amendment. *Talley v. California*, 80 Sup. Ct. 536 (1960).

Freedom to communicate for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the fourteenth amendment.[4] It is commonplace that the printed or spoken word may not be the subject of prior restraint or subsequent punishment unless it creates a substantial manifested or anticipated evil that the state has power to prevent.[5]

The policy toward restrictive "handbill" legislation[6] has been set forth in numerous Supreme Court decisions. An ordinance forbidding any distribution of circulars, handbills or literature of any kind within a city limit without the permission of the city manager is an unlawful abridgment of freedom of the press.[7] So also are ordinances which forbid, without exception, any distribution of handbills on the streets,[8] even where this distribution involves a trespass upon private property in a company-owned town[9] or in a government-owned housing development.[10] Religious sects may not be obstructed under a broad statute from exercising the privilege of

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1 Los Angeles, Calif. Municipal Code § 28.06 (1932), which reads: "No person shall distribute any handbill in any place under any circumstances, which does not have printed on the cover, or face thereof, the name and address of the following: (a) the person who printed, wrote, compiled or manufactured the same, (b) the person who caused the same to be distributed; provided, however, that in the case of a fictitious person or club, in addition to such fictitious name, the true names and addresses of the owners, managers or agents of the person sponsoring said handbill shall also appear thereon." See Denver, Colorado. Revised Municipal Code § 352.13 (1951) (Distribution of Handbills).

2 332 P.2d 447 (Cal. App. 1958).

3 360 U.S. 928 (1959).

4 Cantwell v. Connecticut, 310 U.S. 296 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Schneider v. Irvington, 308 U.S. 147 (1939). Gitlow v. New York, 268 U.S. 652 (1925) (The First amendment is secured against state infringement by the fourteenth). See also Corwin, The Constitution and What it Means Today, 252 (11th ed. 1954).

5 Sweezy v. New Hampshire, 354 U.S. 234 (1957) (compelling interest of the state). *But see* Dennis v. United States, 341 U.S. 494 (1951) (emphasis placed upon serious danger); Bridges v. California, 314 U.S. 252 (1941). Schenck v. United States, 249 U.S. 47 (1919) (opinion by Holmes, J.).

6 The "Handbill" cases, *infra* notes 7, 8, 9, 10, 11. See also the list of preferred position cases identified by Frankfurter in his opinion in Kovacs v. Cooper, 336 U.S. 77 (1949).

7 Largent v. Texas, 318 U.S. (1943); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

8 Jamison v. Texas, 318 U.S. 413 (1943). Schneider v. Irvington, 308 U.S. 147 (1939).

9 Marsh v. Alabama, 326 U.S. 501 (1946).

10 Tucker v. Texas, 326 U.S. 517 (1946).

door-to-door distribution[11] or solicitation,[12] though door-to-door peddling and distribution of purely commercial advertising matter could be lawfully restrained.[13] In *Schneider v. Irvington,*[14] efforts were made to distinguish four broad restrictive ordinances from those previously struck down, on the grounds of prevention of frauds, disorder and littering within the city limits.[15] In refusing to uphold the ordnances, the Court pointed out that there were other means available to accomplish these aims without abridging personal freedom of communication.[16]

The broad ordinance in the instant case falls squarely within the ban of the previous "handbill" cases and is declared void because of unlimited restriction of distribution.[17] The ordinance did not restrict what could be said, who could say it, or where it could be said. The only condition to free distribution of the matter was the identity of the publisher and distributor which created the possibility that someone might hesitate to publish if he must identify himself with his own statements.

The Court had before it, in resolving the familiar problem of individual freedom versus state police power,[18] the question of whether the freedom to communicate also contains the freedom to communicate anonymously.

The Supreme Court has at least three times considered the "right to remain anonymous."[19] While the Court has mentioned the guaranty of freedom of speech in the course of its opinions, the decisions have rested primarily upon the constitutional right of freedom of association.[20] the anonymity in these cases pertaining to privacy within a group. The earliest case, *Bryant v. Zimmerman,*[21] upheld a New York statute which required secret organizations such as the Ku Klux Klan to file membership rosters with the state.[22] Two more recent decisions, *NAACP v. Alabama*[23] and *Bates v. City of Little Rock*[24] (both completely opposite from Zimmerman) held that a state may not compel members of a lawful group engaged in the dissemination of ideas to be publicly identified. The Court reasoned that identification and fear of reprisal might deter perfectly peaceful discussions of public importance.[25]

11 Martin v. City of Struthers, 319 U.S. 141 (1943).

12 Murdock v. Pennsylvania, 319 U.S. 105 (1943).

13 Beard v. City of Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

14 Schneider v. Irvington, 308 U.S. 147 (1939).

15 Schneider v. Irvington, 308 U.S. 147 (1939) (ordinances from Milwaukee, Wisc.; Worchester, Mass.; Los Angeles, Calif. and Irvington, N.J. were tried together on the basis of unlimited restriction of distribution).

16 Schneider v. Irvington, *supra* note 14 at 162.

17 Jamison v. Texas, 318 U.S. 413 (1943); Schneider v. Irvington, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

18 Thomas v. Collins, 323 U.S. 516, 529 (1945) (the court recognized the frequency with which this problem arises and the delicacy of its solution).

19 Bates v. City of Little Rock, 80 Sup. Ct. 412 (1960) (disclosure of membership lists would interefere with members' freedom of speech and association); NAACP v. Alamaba, 357 U.S. 449 (1958) (NAACP not required to divulge membership); Communist Party v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954) *rev'd on other grounds,* 351 U.S. 115 (1956) (statute compelling the Communist party to submit membership lists . . . clear and present danger); United States v. Rumely, 345 U.S. 41 (1953) (concurring opinion, lists of puurchasers should not be required to be divulged); Bryant v. Zimmerman, 278 U.S. 63 (1928) (statute requiring disclosure of membership lists valid).

20 American Communications Ass'n. v. Douds, 339 U.S. 382 (1950) (opinion suggested identification as members of a grouup could have coercive effects on constitutional rights).

21 Bryant v. Zmmerman, 278 U.S. 63 (1928); *State Control Over Political Organization,* 66 Yale L.J. 545 (1957).

22 The Court construed that the statute exempted labor unions and benevolent associations as beneficial, but the potentialities of evil secret societies to render harm brought them necessarily within state control.

23 NAACP v. Alabama, 357 U.S. 449 (1958).

24 Bates v. City of Little Rock, 80 Sup. Ct. 412 (1960).

25 Bates v. City of Little Rock, *supra* note 24 at 416. See also DeJonge v. Oregon, 299 U.S. 353 (1937) (the government remains responsible to the will of the people and peaceful change is effected).

The distinguishing feature of this group of cases appears to be that the degree of privilege is contingent upon the nature of the group, the Ku Klux Klan being more of a threat to peaceful societal existence than the other group.[26]

Justice Black, a known crusader of human liberty,[27] in writing the majority opinion in the instant case, decided that the right of anonymous communication exists, but he has not limited the extent of that right. Surely the Court does not propose to announce a new absolute, namely, that even those groups which have no freedom to speak, or those types of speech which are not privileged can now be uttered anonymously. Since all justices agree, despite the first amendment, that freedom of speech is not absolute, the question becomes one of deciding what and when speech is not protected by the amendments.[28] There is no clear cut rule to determine this nor should there be any mechanical device to dispense justice in such cases.[29] Viewed in the light of past decisions, the court must be merely clarifying that which has been in existence since the adoption of the Bill of Rights—where one is free to speak he is also free to speak anonymously.[30] The effect of the instant holding will remain to be seen in future cases where government regulated communication arises.[31]

Dissenting Justice Clark, joined by two others,[32] sought to limit the "handbill" doctrine to its present bounds by assertng that the Constitution says nothing about freedom of anonymous speech. Further, the Supreme Court itself has upheld an act of Congress requiring any newspaper using second class mail to publish the names of the editor, owner and stockholders.[33] It has upheld the Federal Lobbying Act[34] requiring those engaged in direct lobbying activities to divulge their identities. Statutes in a majority of states prohibit the distribution of anonymous publications that refer to political candidates.[35] Similarly, the Supreme Court has held constitutional city ordinances which prohibit the distribution of leaflets and door-to-door canvassing for purely commercial purposes, the use of sound trucks being operated on the city streets using instruments to emit

26 Judge Swain, Los Angeles Superior Court, concurring in the instant case: "The distinction between the two seems to be that the members of the NAACP are good guys and the members of the Ku Klux Klan are wicked men." 332 P.2d at 452 (Cal. App. 1958). See also United States v. Rumely, 345 U.S. 41 at 57 (1953) the Court did not consider the constitutional question but the concurring opinion, and said, "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears."

27 Justices Black and Douglas, and perhaps Chief Justice Warren, are known as the libertarian element of the Supreme Court, Berns, Freedom, Virtue and the First Amendment, 196 (1957).

28 Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957); American Communications Ass'n v. Douds, 339 U.S. 392 (1950).

29 The line between speech unconditionally guaranteed and speech which will be legitimately regulated, suppressed and punished is finely drawn, Speiser v. Randall, 357 U.S. 513 (1958); Corwin, *Bowing Out "Clear and Present Danger,"* 27 Notre Dame Law. 325 (1952) (the status of the danger rule is subject to doubt). American Communications Ass'n v. Douds, 339 U.S. 382 (1950) ("clear and present danger" is not a mechanical test in every case touching the first amendment).

30 Anonymous writings are far from uncommon in American tradition. See Bleyer, Main Currents in the History of American Journalism 56-57, 79-82, 102 (1927).

31 See generally Mehler, *Constitutional Free Speech v. State Police Power*, 33 DICTA 145 (1956).

32 Justices Frankfurter and Whittaker join dissenting. Justice Frankfuruter is part of the well-known liberalist element of the Supreme Court, Berns, Freedom, Virtue and the First Amendment 197 (1957).

33 Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

34 2 U.S.C. §§ 261-70 (1952); United States v. Harriss, 347 U.S. 612 (1954) (but the statute is narrowly construed).

35 Thirty-six states have statutes prohibiting anonymous distribution of materials relating to elections; see Colo. Rev. Stat. § 49-21-39 (1957), which states, "Whoever willfully publishes or distributes any card, pamphlet, circular, poster, dodger, advertisement or other writing relating to or concerning any person who has publically declared his intention to seek election . . . which does not contain the names of the persons, associations [etc.] . . . responsible for the publication or distribution of the same . . . shall . . . be fined . . . (no Colorado decisions). See also Kan. G. S. § 25-1714 (1949), held constitutional in State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936).

"loud and raucous noises,"[36] and publications containing fraudulent, deceitful, libelous words that cause injury.[37] Ordinances prohibiting obscene statements[38] and false advertising[39] also have been sustained. It was said that Talley's handbill designed to injure a businessman was no more comportable with the first amendment than these. The city was merely acting in the public welfare.

The cases cited on both sides can clearly be distinguished. Each of the "handbill" cases involved a broad ordinance proscribing distribution of all handbills or leaflets, not limiting the matter to that of a commercial or possibly injurious content. The restriction by broad sweep also silenced individuals or groups seeking to further an idea by distribution of material solely devoted to information or public protest.[40]

Those cases which upheld seemingly more restrictive ordinances than in the *Talley* case, dealt with specific legislation within the power of the state to control. The legislation was pointed at a particular type of communication leaving little doubt of the evil or prospective evil sought to be prevented.[41] Clearly, the *Talley* case should not be included with this group unless those dissenting are ready to acknowledge that all speech is to be state regulated.

The purpose of the ordinance provision in the instant case is fairly obvious; it was to make it easy for the city or any individual injured by a publication to place the blame on a particular individual.[42] It is suggested that the prohibition of Talley's anonymous publication in no way restricts his freedom of expression, but merely imposes on the advocate the responsibility necessarily associated with a well-ordered society,[43] the theory being that we should have nothing to hide from one another.[44]

This view overlooks or disregards the long history behind the basic constitutional freedoms[45]—the fact that free discussion of the problems of society is a cardinal principle of Americanism[46] and that the validity of our civil and political institutions depends upon such discussion. Accordingly, a function of free speech and free press under our system of government is to invite dispute. "Its highest purposes are sometimes served when a condition of unrest creates a dissatisfaction with conditions as they are or even stirs people to anger."[47] It was this sort of speech that the Bill of Rights was designed to protect. Those utterances of a purely orthodox nature need no protection.

With this in mind, justification for the "right to remain anonymous" becomes apparent. Few would rigorously assert beliefs if

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36 Kovacs v. Cooper, 336 U.S. 77 (1949).
37 Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Jersey, 315 U.S. 568 (1942); Near v. Minnesota, 283 U.S. 697 (1931); Robertson v. Baldwin, 165 U.S. 275 (1897).
38 Roth v. United States, 354 U.S. 476 (1957).
39 Valentine v. Chrestensen, 316 U.S. 52 (1942) (a state may regulate commercial advertising in the public interest).
40 Bridges v. California, 314 U.S. 252 (1941). See also Thornhill v. Alabama, 310 U.S. 88 (1940).
41 United States v. International Union, 352 U.S. 567 (1957), the regulation measure must be narrowly drawn to meet the evil that the government can control.
42 People v. Talley, 332 P.2d 447, 453 (Cal. App. 1958).
43 Beauharnais v. Illinois, 343 U.S. 250 (1952), 291 ("Ordered Liberty," Jackson, J. dissenting); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1936).
44 We still believe in a secret ballot; some of the most worthwhile literature in American history was written under a pen name. Bleyer, Main Currents in the History of American Journalism, 56-57, 79-82, 102 (1927).
45 Near v. Minnesota, 283 U.S. 697, 813-23 (1931). See generally Douglas, We the Judges 307-28 (1956); See also 5 Encyc. Soc. Sci. 455-59.
46 Pennekamp v. Florida, 328 U.S. 331 (1946).
47 Termuriello v. Chicago, 337 U.S. 1, 4 (1949).

life and lives of family members would be endangered thereby, or if ill will and hostility of the community would be the inevitable result.[48]

It may be urged that if the individual is not required to reveal himself when he speaks and does not accept the responsbility for what he says, the community will not be able to protect itself from injurious frauds, libels and obscenity that would result.[49] The aims of the Los Angeles ordinance may have indeed been worthy ones, but the fact that the liberties may be abused by a miscreant few does not make any less the necessity of immunity of the individual from previous restraint.[50] It must be remembered that the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the law and that, in its attainment, other social objects of a free society should not be sacrificed.

Richard W. Laugesen.

BAR BRIEFS

REPORT OF LEGAL FEE REVIEW COMMITTEE TO THE COLORADO BAR ASSOCIATION

Gentlemen:

The Colorado Bar Association, at its 1959 annual meeting, authorized the creation of a Legal Fee Review Committee, to serve the public, clients and attorneys, in the adjustment of controversies concerning legal fees, without resort to the costly, protracted and drastic remedies previously available. That Committee has been organized recently and is now in functioning order.

The services of the Committee are available to all clients of all lawyers actively engaged in practice in Colorado, whether members of the Association or not and to the lawyers themselves.

The Committee is composed of one member of the Colorado Bar Association from each judicial district in Colorado appointed by the President of the Association. To insure continuity, one-third of the Committee serves for one year, one-third for two years, and one-third for three years. It meets as determined by the Committee or upon call of the Chairman, who is appointed for a period of one year by the President of the Association.

The Committee functions in the following manner. A complaint in a controversy over legal fees is filed by either the client or the attorney with the Colorado Bar Association. The Secretary immediately notifies both parties that the matter will be held in abeyance for 30 days to allow the parties an opportunity to settle their differences. Upon notice by either party that the controversy has not been settled within the 30-day period, it is then referred to the Com-

48 NAACP v. Alabama, 357 U.S. 449, 462 (1958); People v. Talley, 332 P.2d 447, 453 (Cal. App. 1958) (dissenting opinion).

49 The state contended that the ordinance was aimed at prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel," 80 Sup. Ct. 536, 539 (1960).

50 Near v. Minnesota, 283 U.S. 697, 720 (1931).

life and lives of family members would be endangered thereby, or if ill will and hostility of the community would be the inevitable result.[48]

It may be urged that if the individual is not required to reveal himself when he speaks and does not accept the responsbility for what he says, the community will not be able to protect itself from injurious frauds, libels and obscenity that would result.[49] The aims of the Los Angeles ordinance may have indeed been worthy ones, but the fact that the liberties may be abused by a miscreant few does not make any less the necessity of immunity of the individual from previous restraint.[50] It must be remembered that the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the law and that, in its attainment, other social objects of a free society should not be sacrificed.

Richard W. Laugesen.

BAR BRIEFS

REPORT OF LEGAL FEE REVIEW COMMITTEE TO THE COLORADO BAR ASSOCIATION

Gentlemen:

The Colorado Bar Association, at its 1959 annual meeting, authorized the creation of a Legal Fee Review Committee, to serve the public, clients and attorneys, in the adjustment of controversies concerning legal fees, without resort to the costly, protracted and drastic remedies previously available. That Committee has been organized recently and is now in functioning order.

The services of the Committee are available to all clients of all lawyers actively engaged in practice in Colorado, whether members of the Association or not and to the lawyers themselves.

The Committee is composed of one member of the Colorado Bar Association from each judicial district in Colorado appointed by the President of the Association. To insure continuity, one-third of the Committee serves for one year, one-third for two years, and one-third for three years. It meets as determined by the Committee or upon call of the Chairman, who is appointed for a period of one year by the President of the Association.

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mittee for action, not however, until both parties have executed a brief Referral Agreement, in which it is agreed that the matter be referred to the Committee for investigation and final and conclusive determination, that the parties will assist the Committee in every manner in its investigation, and that they will abide by the determination of the Committee.

The Chairman of the Committee then appoints an investigating committee of three members who are selected from a panel of all members of the Colorado Bar Association residing in the appropriate judicial districts. To better insure fair and impartial judgment, if client and attorney reside, or client resides and attorney has an office in the same judicial district, the investigating committee is selected from the panel of that judicial district. If the attorney's office is in one judicial district, and the client resides in another, one member of the committee is chosen from each such judicial district, and the third member from another judicial district. There are similar provisions in the event the client is a corporation or is a nonresident of the state.

The investigating committee examines the parties to the controversy, interviews witnesses and makes such other investigation as it deems appropriate. When the investigation has been concluded, the findings and recommendations of the Investigating Committee are forwarded to the Chairman of the Legal Fee Review Committee. This Committee reviews the action of the Investigating Committee and makes a written determination and decision as to whether the fee complained of should be approved or disapproved and decreased. Further hearings before the Committee may be had if deemed advisable. The determination of the Committee may include a finding that a greater fee would have been justified, and a finding as to the amount of a proper fee. Such two last mentioned findings are not mandatory and are not binding on the parties. The final decision of the Committee is submitted to the Secretary of the Colorado Bar Association, who forwards copies to the parties to the controversy, and to the Chairman of the Investigating Committee, and as stated, the decision is binding upon the parties to the controversy.

The Committee may decline to accept jurisdiction, or may surrender the same, if it becomes apparent that there is no just ground for complaint or dispute, that the matter is moot, or if for any other reason deemed adequate, jurisdiction is, or becomes unwarranted.

In reaching decisions, the Committee and the Investigating Committee may consider appropriate minimum fee schedules and all other pertinent factors, and shall consider all related matters in the Canons of Ethics of the American Bar Association. The Committee shall be guided by the recommendations of the Investigating Committee, but shall not be bound thereby.

All matters in connection with each controversy are to be held in confidence by the members of the Committees and the officers of the Colorado Bar Association, so far as is reasonably possible.

Respectfully submitted,

HENRY S. SHERMAN, Chairman

RULES OF PROCEDURE OF THE LAWYERS' FIDELITY FUND COMMITTEE OF THE COLORADO BAR ASSOCIATION

I. STATEMENT OF PURPOSES

The purposes of the Lawyers' Fidelity Fund are:

A. To furnish a means of protecting the reputation of lawyers in general from the consequences of dishonest acts of a very few.

B. To furnish a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers:

(1) To the extent that the Fund is capable of making reimbursement; and

(2) If in the opinion of the Committee the client is entitled to reimbursement.

In establishing the Lawyers' Fidelity Fund the Colorado Bar Association did not create, nor acknowledge, any legal responsibility for the acts of individual lawyers in their practice of law. Therefore, all reimbursements of losses by the Lawyers' Fidelity Fund shall be made solely at the discretion of the Committee and not as a matter of legal right capable of enforcement by any claimant.

II. RULES OF PROCEDURE

Definitions

For the purpose of these rules of procedure, the following definitions shall apply:

(1) The "Committee" shall mean the Lawyers' Fidelity Fund Committee.

(2) The "Fund" shall mean the Lawyers' Fidelity Fund.

(3) "Lawyers" shall include only those lawyers admitted to practice law within the State of Colorado, domiciled and actively practicing law within said State.

(4) "Reimbursable Losses" shall include only those losses of money or other property of clients of lawyers which meet the following tests:

(a) That the loss shall have been caused by the dishonest act of a lawyer.

(b) That the lawyer shall have died, been adjudged mentally ill, been disbarred or suspended from practice.

(c) That the dishonest act shall have been committed within the State of Colorado, or as a part of a contract of employment, the major portion of which was to be performed within said state.

The following shall be excluded from "Reimbursable Losses":

(a) Losses of wives and other close relatives, partners, servants and employees of lawyers; and

(b) Losses the proof of which, either as to factual existence or as to amount, is dependent upon inventory computation or profit and loss computation.

(5) "Dishonest Acts" shall mean wrongful acts committed by lawyers against clients in the manner of defalcation or embezzlement of money, or the wrongful taking or conversion of property of such clients, or the failure to remit moneys or property when due such clients.

III. MANNER OF MAKING APPLICATION FOR REIMBURSEMENT

Applications to the Fund for reimbursement for loss suffered by clients as the result of dishonest acts of lawyers shall be in writing and shall be addressed and delivered to the Chairman of the Committee. Said applications shall be in such form as the applicant may deem suitable for presenting the facts of his case, but shall contain the following minimum information:

A. The name of the "Lawyer."

B. The amount of the "Reimbursable Loss"; and

C. The date or period of time during which the loss was incurred, together with a sufficient statement of facts to show that the loss is in fact a "Reimbursable Loss" as hereinbefore defined.

All applications shall be supported by submission of such documentary evidence as may be available and shall be signed by the applicant.

IV. PROCESSING AND ALLOWANCE OF APPLICATIONS

Applications submitted to the Committee shall be referred by the Chairman to any member or members of the Colorado Bar Association for investigation and recommendations as to the validity of the claim included in the application. Such members shall be reimbursed for reasonable out-of-pocket expenses incurred by them in making such investigations.

The reports of investigation and the recommendations thus made shall be submitted to the Committee as a whole. The Committee, during the month of December of each calendar year, in its sole discretion shall determine the amount of loss for which any client shall be reimbursed and in making such determination the Committee shall consider, inter alia, the following.

(1) The negligence, if any, of the client which contributed to the loss,

(2) The comparative hardship the client has suffered by the loss,

(3) The total amount of applications for reimbursement which has been submitted by the clients of any one lawyer or association of lawyers, and

(4) The total amount of applications for reimbursement which has been processed by the Committee during said calendar year, with due regard to the total assets of the fund, provided, however, that no claim filed after November 31, shall be payable out of funds available for that calendar year, but may be considered by the Committee during the succeeding calendar year.

(5) No reimbursement shall be made to any client unless approved by a majority of the Committee.

V. SUBROGATION FOR REIMBURSEMENTS MADE

In the event reimbursement is made to a client, the Fund shall be subrogated in said amount and may bring such action as it deems advisable against the lawyer, his assets or his estate, either in the name of the client or in the name of the Colorado Bar Association. The client shall be required to execute a subrogation agreement in said regard.

The client shall be entitled to bring an action for recovery of losses directly against the lawyer, his assets or his estate if the Committee has not done so within six month of execution of the subrogation agreement. Any amounts recovered from the lawyer, either by the Committee or the client, in excess of the amount to which the fund is subrogated, less the Committee's actual costs of such recovery, shall be paid to or retained by the client as the case may be.

VI. MEETINGS OF THE COMMITTEES

The Committee shall meet from time to time upon call of the Chairman, provided that the Chairman shall call a meeting at any reasonable time at the request of at least two members of the Committee.

VII. GENERAL PROVISIONS

No publicity shall be given to the rules of procedure, to applications for reimbursement, payments made by the Committee or to any action of the Committee without the express prior approval of the Board of Governors of the Colorado Bar Association.

These rules may be changed at any time by a majority vote of the Committee if said changes are approved by the Board of Governors of the Colorado Bar Association.

These rules have been adopted subject to the approval of the Board of Governors of the Colorado Bar Association this 10th day of September, 1960.

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Drawing a Will?

- Please remember the University of Denver and particularly the University of Denver LAW CENTER.

- When you draw your will or a will for a client, consider the desirability of supporting this private institution.

- It is particularly appropriate to give special consideration to the needs of the LAW CENTER as it begins an expanded program in legal education and service to the legal profession and administration of justice.

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